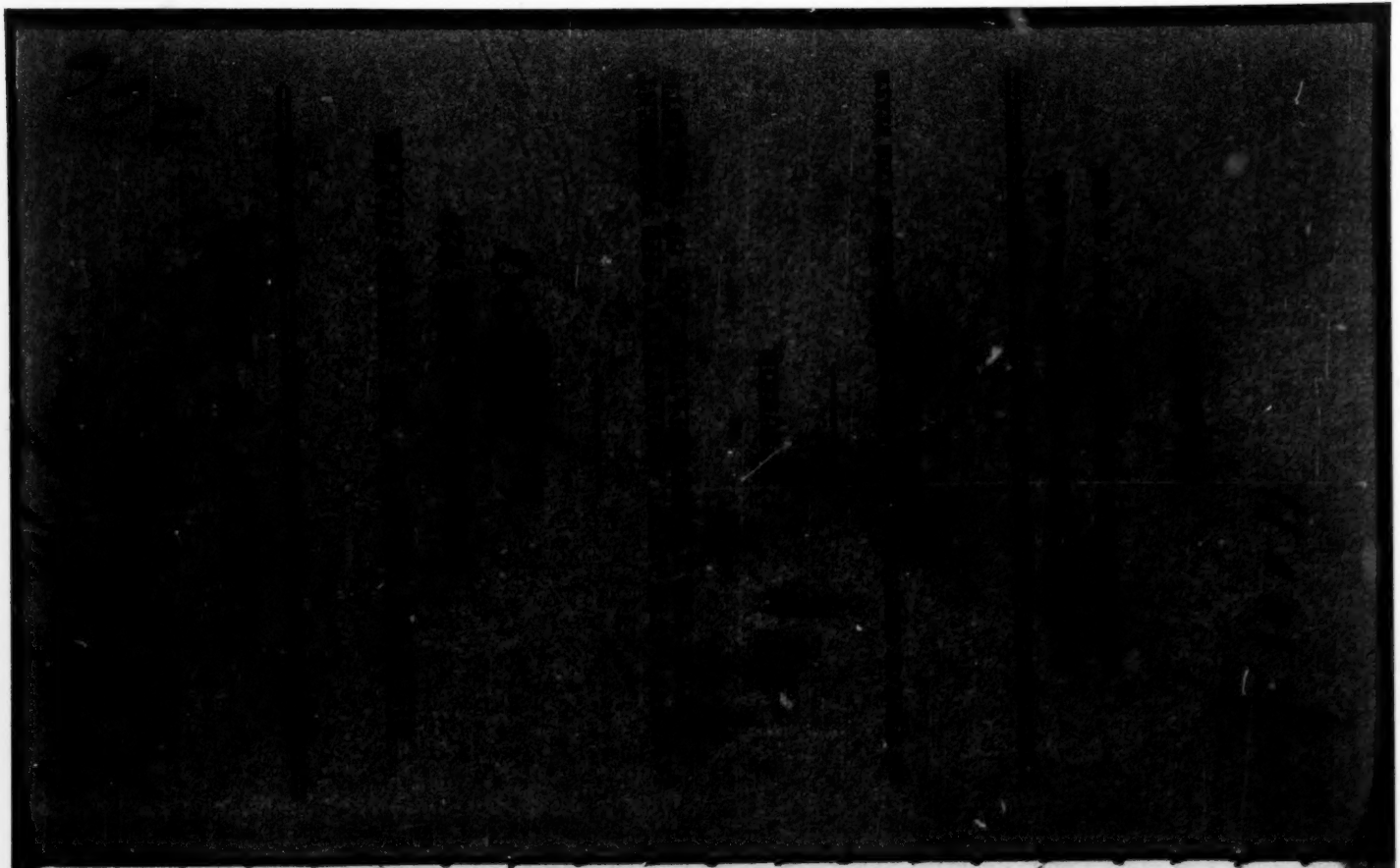

(29,604)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 322

JAMES C. DAVIS, AGENT APPOINTED BY THE PRESIDENT UNDER THE TRANSPORTATION ACT OF 1920, PETITIONER,

vs.

J. M. CURRIE.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

INDEX.

	Original.	Print.
Caption in supreme court of South Carolina	1	1
Case and exceptions in Sumter circuit court	1	1
Statement	1	1
Complaint	2	1
Testimony of J. M. Currie	5	4
C. W. Bellinger	10	7
W. R. Johnson	10	7
J. M. Currie (recalled)	12	8
Judge's charge	13	9
Motion for new trial	23	15
Memorandum and order overruling motion for new trial	24	16
Defendant's exceptions	27	18
Stipulation settling case	30	20
Opinion, Marion, J., and judgment	32	21
Petition to amend opinion and judgment	45	29
Order staying remittitur	49	31
Order amending judgment	50	31
Remittitur of J. M. Currie	51	32
Clerk's certificate	52	32
Writ of certiorari and return		33

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1 THE STATE OF SOUTH CAROLINA:

**IN THE SUPREME COURT, THIRD CIRCUIT,
SUMTER COUNTY,**

OCTOBER TERM, 1922.

Hon. T. J. Mauldin, Presiding Judge.

J. M. CURRIE, Respondent,

against

JAMES C. DAVIS, Agent Appointed by the President under Sec. 206 of the Transportation Act of 1920, Appellant.

L. D. Jennings, M. M. Weinberg, Attorneys for the Respondent.
Douglas McKay, Reynolds & Reynolds, Attorneys for the Appellant.

CASE AND EXCEPTIONS.

Statement.

This cause was begun by the service of summons and complaint on the defendants on the 19th day of September, 1919. The action was originally against Walker D. Hines, Director General of Railroads, Atlantic Coast Line Railroad Company, and R. L. Crosswell.

2 In due course the complaint was dismissed as against the Atlantic Coast Line Railroad Company. Before the trial the complaint was amended, substituting James C. Davis, agent appointed by the president under section 206 of the Transportation Act. It was also learned that Crosswell was dead and so plaintiff announced that the complaint was dismissed against Crosswell. The case was tried before his Honor Judge T. J. Mauldin, Presiding Judge, and a jury, at the Fall Term of Court of Common Pleas for Sumter County, November 23rd, 1921, and a verdict returned by the jury: "We find for the plaintiff in the sum of ten thousand dollars actual damages." A motion for a new trial was made and refused and defendant duly served notice of intention to appeal to the Supreme Court of South Carolina from the Judgment, which was duly entered on said verdict.

Pleadings.

(Omitting Introductory Allegations.)

Complaint.

I. That the defendant, R. L. Crosswell, was in the employ of James C. Davis, agent, as gateman, in charge of the gate through which passengers desiring to board trains at Florence, S. C., must

pass, and it was the duty of defendant Crosswell to permit passengers as trains were ready to depart, to pass through said gate.

IV. That on the 31st day of August, 1919, the plaintiff, Currie, was in Florence, S. C. and purchased a ticket for Mayesville, S. C. That the plaintiff was informed his train would leave in a few minutes and so he approached the gate with his ticket in his hand. That he took his position at the end of the line of persons passing through the gate, and when he reached defendant Croswell, he showed him his ticket and told him he was going to Mayesville, S. C. That Crosswell told him he could not go through the gate now. That plaintiff thereupon informed Crosswell that his train was about to leave and that he would lose it if he did not go through the gate,

3 but Crosswell cursed him, told him he could not go through and put his hand upon plaintiff and shoved him, causing him to fall over some suit cases, humiliating him in the presence of a consideratble crowd of ladies and gentlemen, and causing minor bruises to various parts of plaintiff's person. That plaintiff picked himself up and being very angry did not immediately approach said defendant Crosswell, but went off to compose himself. That after composing himself he again approached the gate, again informed defendant Crosswell he was going to Mayesville, S. C. and handed said defendant his ticket. That Crosswell informed plaintiff he could not go, that he would not let him pass through the gate, and again tried to assault him, but plaintiff moved back out of the way, telling Crosswell not to shove him, that he would not go through the gate against his direction. That Crosswell thereupon cursed plaintiff again and told him he would shove him and hit him if he felt like it, and he could not go through the gate. That plaintiff again left the gate, and waited two or three minutes, and for a third time approached said gate and told gateman his train was ready to go and that he had to go, and showed gateman his ticket, and the gateman again refused to let plaintiff pass through the gate, and told plaintiff he would not let him through until he was ready.

V. That plaintiff went to ticket agent and explained that it was very necessary for him to take the train to Mayesville at that time as he had financial arrangements to make in Mayesville in order to get certain machinery, which was then on demurrage—that he had a man ready to erect same and that it would cost him more than five hundred dollars to remain in Florence over night. That the ticket agent informed plaintiff he did not know what was wrong with the gateman, but perhaps plaintiff could slip around the fence. That plaintiff refused to do so and ticket agent advised him to try *and* get through the gate again.

4 VI. That for the fourth time plaintiff approached said gate and tried to get through, but said gateman again refused and again cursed out plaintiff. That plaintiff went off and in a few minutes, in the presence of two witnesses, again approached the gate and offered his ticket and the gateman again refused to let plaintiff through and informed plaintiff he would not let him through, even if the superintendent told him to do so.

VII. That plaintiff then ascertained that his train had gone, but after a few minutes he went back to try and get through the gate and again showed his ticket, and the gateman informed him he was not going to let him through until he was ready to do so.

VIII. That plaintiff then went to Mr. Cole's office and informed him of what had happened and Mr. Cole promised to investigate the matter.

IX. That said defendants by and through said R. L. Crosswell wilfully and wantonly and maliciously prevented plaintiff from taking his train, cursed, assaulted and abused plaintiff, caused him great humiliation, the loss of two days' time, and damaged him by reason of his failure to take up said machinery on demurrage and by reason of having his laborers idle on account thereof, and that the acts of the said defendants in so refusing to admit plaintiff to his train and in so cursing, assaulting and abusing plaintiff, jointly and severally, caused and occasioned plaintiff damage in the sum of $50,000.00.

X. That the defendants negligently employed the defendant R. L. Crosswell as such gate-keeper, knowing him to be a person of rash temper and uncertain judgment and unfit to perform the duties of such position, and that the acts and omissions of the defendants, as herein set forth, jointly and severally, contributed to the plaintiff's injury and damage as aforesaid.

The answer of the defendants consisted of three defenses, the first being a general denial and the second and third defenses allege in substance that if the plaintiff suffered any injury as the result of the negligence and wilfulness of the defendants, which they expressly deny, such injury was contributed to by the plaintiff's contributory wilfulness and in the negligent manner in which he conducted himself, in failing to realize that the gateman was laboring under a mistake or misapprehension as to the plaintiff's rights, in failing or refusing to recognize that the gateman was mistaken as to what plaintiff's ticket called for, in failing or refusing to recognize that the gateman was mistaken as to the destination shown on plaintiff's ticket and the train which he desired to board or the train which he should have boarded on which to reach the destination which the said gateman thought he desired to reach, in failing or refusing to recognize and realize that the gateman was unable to understand the situation, by failing and refusing to enter to his train by a means of approach fully open to him and to which his attention was appropriately directed, in failing and refusing to take an open and obvious route to his train, which was fully known to him or which by the exercise of his senses he could and would have discovered, and by generally conducted himself in a careless, negligent, and wilful manner; all of which negligent and wilful acts on the part of the plaintiff combining and concurring with the supposed acts of negligence and wilfulness on the part of the defendants contributed to his injury, if any, as a proximate cause thereof without which the same would not have occurred.

Evidence.

J. M. CURRIE, plaintiff, testified as follows:

That he was in Florence, where his wife was sick in the hospital, on Sunday, August 31st, 1919, and bought a ticket for Mayesville, S. C. When his train came up he went out to the gate, which was open about two feet, to get to his train. When his turn came to pass through the gate he showed the gateman his ticket, the gatemen at the time was looking at tickets and telling people what track
6 the train was on. The gateman looked at his ticket, handed it back to him and then reached over and gave plaintiff a shove and plaintiff fell over the suit cases and on some spiked fence, which bruised his arm. That this happened before a crowd of people. That he went back to the station and waited until the crowd passed through the gate and then went to the gate again and gave the gateman, Crosswell, his ticket. That the gateman looked at it and said "You can't go through" and tried to push him again. Plaintiff stepped back and told Crosswell not to shove him again, that he wouldn't try to go through. That the gateman said "God damn you, I will shove you, and I will do more than that, I will knock hell out of you." Plaintiff told gateman he was not trying to run through, but that he had bought his ticket and wanted to get through. Whereupon the gateman told plaintiff that he was running the gate and would let him through when he got ready. Plaintiff went to the gateman a third time and handed him his ticket and the gateman said "God damn you, you can't go through here," plaintiff went back a fourth time, but gateman would not let him through, so he went into the depot and told the ticket agent that he could not afford to get left in Florence, that he had to go to Mayesville to get his money and that he had a telegram stating the erector would meet him Monday morning. That he couldn't get his machinery up unless he met this man and that he "would not be left there for five hundred dollars." Ticket agent told plaintiff about another gate he could go through and the gateman couldn't bring him back, whereupon plaintiff replied that he did not want to steal through as he had bought his ticket. Plaintiff testified this other gate was about seventy-five feet away, but not for passengers to go through. The ticket agent then told plaintiff to try the gatekeeper again, but the gatekeeper would not let him through and he met Captain Johnson, a conductor for the Atlantic Coast Line Railroad Company. That Capt. Johnson said to him "Mr. Currie, what is the matter with that fellow, anyhow?" and plaintiff replied that he did not know. That Capt. Johnson then told him to
7 try the gateman again and make him take the ticket. Plaintiff went back to the gate, and gatekeeper took his ticket and said "No, damn it, you can't get through here until I get ready" and plaintiff replied "I want to know why I can't go through, plaintiff said he never told gatekeeper about the importance of getting back to Mayesville. Plaintiff went back to gateman and told the

gateman what the ticket agent said and the gateman replied that he didn't care what the ticket agent or Mr. Hare, the superintendent, or anybody else said he wouldn't let him through; he was running that gate." Plaintiff then tried to get through the gate twice more, with the same result. The train had gone before he tried to get through the gate the last time. Plaintiff said he got left, and there was no other train for him to take to Mayesville that night from there. Captain Johnson said "I don't understand, I will carry you to Mr. Cole's office." That he went to Mr. Cole's office and reported the matter. After that he got a car and went to the hotel to spend the night. He didn't go to see his wife, as he was so worked up he could not sleep a wink. He left Florence the next morning but he didn't have time to stop in Mayesville to get his money and papers, before catching the train for Eutawville. That if he had caught the train in Florence Sunday night he would have made his arrangements in Mayesville and met his man in Eutawville. Plaintiff met his man when he reached Eutawville and he had about ten negroes there to unload the machinery. Couldn't unload the machinery because he didn't have the bill of lading and he couldn't get the bill of lading because "the papers he was to pay for it with were in Mayesville." The man who met him was from the Continental Gin Co., Charlotte, N. C. This erector came again on Wednesday. Plaintiff couldn't get him sooner because he had started on another job. Erector started work on his place Thursday morning, causing a delay of four days. Unloaded the machinery on Tuesday, but could not erect it without the erector. Plaintiff testified he
8 had a cotton gin shipped to Mayesville and it was on the road at the time, and he was therefore delayed four days at Mayesville. Over objection of Mr. Reynolds that such evidence was speculative as to damages plaintiff was allowed to testify that he ginned forty bales a day after the gin was erected, which would bring in $140. He also sold the bagging and ties for the bales at a profit of fifty cents per bale, making a total profit per day of $160. Currie also testified over objection of Mr. Reynolds that he ginned fifty bales a day at Mayesville, after the gin was erected at a profit of $175 per day, including profit on bagging and ties.

Cross-examination by Mr. Reynolds:

Plaintiff testified that he had never met Mr. Crosswell, the gateman, before. That his train was due to leave Florence at seven forty-five p. m. and was due in Mayesville around eight o'clock. There are about six tracks at the depot in Florence and between these tracks and the depot a fence, and the gate in question is just a few feet from the ticket office leading through the fence to the tracks. That below the ticket office there is a restaurant and a gate in front of the restaurant, about seventy-five feet from the ticket office and passengers pass through this gate sometimes to get something to eat. Plaintiff said when he first handed the ticket to the gatekeeper he told the gateman he wanted to go to Mayesville and the gateman said nothing, just shoved him out of the way. That the reason he didn't

strike the man and go through the gate was that the gatekeeper had the advantage of him as he was working for the government. It seemed that Crosswell was very much excited. That he tried to get through the gate four times before going to the ticket agent. That the agent told him there was another gate he could go through. That if he had gone through the gate down there he could have caught his train. That when he came downstairs, after reporting the matter, he hired a hack, and at that time Crosswell came up to him and said he had made a mistake, a hell of a mistake. Whereupon plaintiff said "I tried to get that out of you, but all I could get out of you was that if I came near you you would knock hell out of me." And Crosswell then said "I didn't say anything out of the way, except refuse to let you out of the gate, and anybody else who says I said anything else tells a damn lie." And plaintiff responded "You have been trying to pick a fight with me ever since the first time I tried to get through the gate."

Plaintiff testified that Mayesville was only twenty-nine miles away, but he didn't think he ought to have hired an automobile to go to Mayesville. That four days after the accident Mr. Hare wrote him for his statement in order to adjust the matter but that he had already entered suit through Mr. L. D. Jennings, and so he did not send Mr. Hare the statement.

That Captain Johnson went to the gate with him and after the gateman did like he did Johnson said "If a man did me that way, I would jump right on him."

Q. Didn't he try to get you through the other gate?

A. No, sir. He told me about the gate at the end of the fence; I didn't know which it was.

That he didn't hire an automobile because he did not think about it; he didn't aim to do it, even though the weather was good—the company would not have refunded the money.

That at that time his ginning machinery had not arrived in Mayesville, that he could have taken an automobile to Mayesville the night he got left, gotten his checks, and gone on to Eutawville the next morning.

That he did not have an appointment to meet the erector of the Continental Gin Company at Eutawville, but that he had a telegram from the Continental Gin Co., saying he could get the erector at Parlers, about three miles from Eutawville, when he wanted him, so he sent word to Parlers for the erector not to come that day as he could not get his machinery. Plaintiff could not recall what checks he had in Mayesville nor how much money. That ginning machinery at Eutawville was on demurrage, but he did not pay the demurrage, because the railroad people knocked off the demurrage on account of the way they treated him.

That the erector, who was at Parlers, was to have been in Eutawville Tuesday morning, but he didn't get there as he had started on another job.

That Crosswell was about forty years old.

Testimony of W. R. Johnson.

Redirect:

That he would have had to walk across six tracks if he had gone through the gate by the restaurant. Had ten dollars in his pocket on the night he got left.

Defense.

The testimony of C. W. Bellinger, Train Despatcher, based on the train sheet made up by him, and the train sheet for the train in question were ruled out on the ground that this evidence was hearsay, since he did not see the train and what he put down on his record was based upon information furnished by the station master as to the time the train left Florence and on telegraphic reports received from the various stations denoting the time of arrival and of departure. By this witness the defense attempted to prove that this particular train left Florence late, was delayed near Lynchburg and did not reach Mayesville until about midnight; that had plaintiff gone on the train he would have reached Mayesville too late to transact business, and that by going by automobile he could have arrived sooner than the train.

W. R. JOHNSON testified for the defendant as follows:

That he was conductor for the defendant, running a train between Florence, S. C. and Augusta, Ga. at the time of this trouble. That on the night in question he reached Florence about eight o'clock and was on his way to the ticket office when Currie stopped and told him the gateman would not let him through the gate. Currie
11 asked him to accompany him to the gate, which he did. The gateman refused to let Currie through, and they walked off together and he suggested to Currie to go through the other gate at the restaurant, "the restaurant gate" as it was called and that if Currie did not know the train he would show it to him. This Currie refused. This gate was fifteen or twenty yards below the gate at which the gateman was. This gate is used by a great many passengers going in and out. That after going through the lower gate Currie could have turned and had a cement walk all the way to his train. After Currie got left Capt. Johnson took him to the chief dispatcher's office and introduced him to Mr. Cole and then left him.

Cross-examination:

That he first met Mr. Currie on the night in question in front of the waiting room, and Currie told him Crosswell wouldn't let him through the gate, and Johnson offered to go to the gate with him. That when they got to the gate Crosswell said to Currie "I told you I wasn't going to let you through the gate, and I don't want to be bothered any more." That Currie handed Crosswell his ticket, but that Crosswell did not curse Currie. Johnson then went into the wait-

ing room and went to the ticket window to transact business with the ticket agent, and Currie came in and told the agent he must have given him the wrong ticket, because the gateman wouldn't let him through.

That there is a gate in front of the restaurant, without a gatekeeper, through which passengers pass freely. That he had been in Florence ever since the station was built and he never knew the gate at the restaurant to be used for anything else than for passengers to go in and out. In going through the gate in front of the restaurant, and directly across to the train one would have to cross the tracks without a walk-way, but if one turned down by the fence he would have a cement walk. That he went to the gate with Mr. Currie to see
12 what he could do, but he saw Crosswell was mad and vexed, and as he, Johnson, was in civilian clothes and Crosswell did not know him from anyone else, he decided it was best not to vex Crosswell any more. Crosswell had been gatekeeper at Florence about two or three weeks. That he did not hear Crosswell use any curse words at all. That after Crosswell refused to let Currie through he offered to take Currie around and show him his train.

Mr. Jennings:

"Q." As a railroad conductor, why didn't you carry him through this gate where he had a right to go, why did you want to promenade him up to the other gate?"

Capt. Johnson:

"A." Well, I told you a while ago I was dressed in civilian clothes same as Mr. Currie; Mr. Crosswell didn't know he; I wasn't going to ask him after I saw his attitude. After he told Mr. Currie not to bother him, that was the easiest way out, if it was the longest way round. Witness testified that the gateman followed the plaintiff into the waiting room of the station, and again told plaintiff not to bother him any more. That the witness would have resented gateman's actions. That train left Florence before gateman would let plaintiff through.

Redirect:

There was still another gate situated in front of the baggage room, but this gate is twice as far as the other.

Defense rests.

Mr. CURRIE, plaintiff, testified in reply that when Johnson accompanied him to the gate Crosswell did curse him, saying "Damn it," he would let me go through when he got ready! That Capt. Johnson did not offer to take him through the gate and show him his train.

Cross-examination:

The ticket agent told him to go through the gate by the restaurant and not Capt. Johnson.

13 **Judge's Charge.**

MR. FOREMAN AND GENTLEMEN OF THE JURY: This action as originally brought, as you will see from the caption and from the body of the complaint also, is by J. M. Currie as plaintiff against one Walker D. Hines as Director General of Railroads, Atlantic Coast Line Railroad Company, and R. L. Crosswell, defendants, and you have heard it stated here in open Court that the complaint in this case proceeds now as against James C. Davis, as agent of the Government, the government in its mandates at the time having control and operation of the Atlantic Coast Line Railroad Company, and this action is in effect an action against the United States Government of the United States of America, as agent, etc. So, then, gentlemen of the jury, that becomes a matter of importance in so far as the action now is concerned for reasons which I will explain to you during the progress of my remarks to you.

What is this case? It is an action, gentlemen of the jury, brought by the plaintiff to recover damages *predicted* upon certain alleged conduct, which the plaintiff charges against he railroad or its agents; it is an action wherein the plaintiff seeks to recover actual damages as differentiated from punitive damages, and I shall endeavor to make myself clear as we proceed. The plaintiff charges, as you will see when you come to take up the consideration of this case, that the real complaint against the defendant is epitomized or succinctly stated in paragraph nine of the complaint, where the plaintiff says that the defendants, by and through the said R. L. Crosswell, wilfully, wantonly and maliciously prevented the plaintiff from taking his train, cursed, assaulted and abused plaintiff, caused him great humiliation, the loss of two days' time, and damaged him by reason of his failure to take up said machinery on demurrage and by reason of having his laborers idle on account thereof, and that the acts of the said defendants in so refusing to admit plaintiff to his
14 train and in so cursing, assaulting and abusing plaintiff, jointly and severally, caused and occasioned plaintiff damage in the sum of fifty thousand dollars.

Now, in so far as the defendants as originally drawn in this complaint, R. L. Crosswell is eliminated from this case, except in so far as he may be concerned in the matter of your inquiry.

Now, what are the issues presented here? The issues are brought to your intelligence through the medium of pleadings. The pleading on behalf of the plaintiff is the complaint; that by the defendant is the answer; these join the issues, and it is to those issues that the evidence is directed here whether or not—for the jury to say whether or not the plaintiff is entitled to a recovery. You will see by the complaint that the plaintiff charges that the defendant was guilty of a conduct which he contends as negligent, which he contends as wilful, and which he contends as malicious, and by reason of that conduct on the part of the defendant and its agent, the plaintiff has suffered damages in the sum of fifty thousand dollars.

Therefore, Mr. Foreman and gentlemen of the jury, it becomes necessary for us to understand the legal significance of those terms in order that you may properly apply the law to the facts in this case. What is negligence? Negligence is the failure to exercise due care; that is a short definition of negligence. The law says that all persons—that includes corporations, as corporations are artificial persons—all persons in their intercourse one with another must exercise due care; to exercise that care, precaution and vigilance which the circumstances attending a transaction justly required, and the failure to exercise that care, precaution and vigilance which the circumstances attending a transaction justly required, and by reason of which some other person suffers some injury or some damage, is negligence. Take the other phraseology in the complaint, wherein the plaintiff charges that the defendant was not only negligent, but that the defendant was wilful in conduct. Wilfulness, as characterized in conduct, is simply a degree of
15 negligence. If one is failing to exercise due care, we say he is simply negligent. If he proceeds in that conduct to the point that he becomes conscious of the fact that he is not exercising due care in keeping with the circumstances of that case, we say he is wilful; he is conscious that he is not exercising due care, and we say he is wilful. So, then, Mr. Foreman, and gentlemen of the jury, in order that you may understand the real significance and the real definition between negligence and wilfulness as charged, I will tell you that any ordinary case, or even in this case, were the government not a party to this case, the plaintiff under the allegations of this complaint could claim against this defendant what is known as punitive damages. Therefore, it becomes necessary for me to define punitive damages as differentiated from actual damages. Actual damages are those actual, measurable, tangible damages, those damages which are actually capable of being measured in dollars and cents, which actually grow out of the transaction. Punitive damages are those damages which the law says that a jury may award a person who is wilful in conduct; to punish one who consciously invades another's rights, in order to deter him and set an example for others not to consciously invade another's rights. Punitive damages is not an element in this case. It is my duty to charge you that you can not award punitive damages here to the plaintiff, for the reason that punitive damages are not competent here as against the Government. So, you confine yourselves to the evidence in this case with a view of determining whether or not the plaintiff is entitled to recover what I have explained to you as actual damages; whether or not the plaintiff is entitled to recover that as against the defendant here.

Now, Mr. Foreman and gentlemen of the jury, the plaintiff charges that the defendant here in its conduct was negligent; that it was wilful; that it was malicious, and that by reason of that the plaintiff sustained certain injuries. The plaintiff charges that the defendant was negligent, and I might find it necessary to
16 repeat somewhat. The plaintiff also charges that the defendant was wilful. The purpose of your inquiry in this case

will have to do with determining whether or not, under the evidence in this case, by the allegations of this complaint, whether or not the alleged recklessness or the alleged negligence on the part of the defendant, or the alleged wilfulness on the part of the defendant, has been established ac-ording to the allegations of the complaint, and whether that alleged negligence or alleged wilfulness, if it is established, is a direct and proximate cause of the injury of the plaintiff, if he sustained any.

Now, gentlemen, the answer in this case sets up first what is called a general denial, and that is that the plaintiff is put upon proof of all the material allegations of his complaint. He denies the allegations of the complaint and nothing is presumed, because, as I have indicated at the outset, pleaders are bound by their pleadings. The plaintiff must establish those allegations by the greater weight of the evidence, where, as in this case, the issues are presented to the jury by a denial of those allegations. The denial of the allegations of the complaint by the answer puts the burden on the plaintiff to establish the material allegations of his complaint. In addition to the general denial, the defendant says that the plaintiff was guilty of contributory negligence. Let us understand what contributory negligence is; I have told you what negligence is; I have told you what wilfulness is. Contributory negligence, as a defense, simply means this; the defendant says this: "I deny that I was negligent, yet if I was negligent, the plaintiff was also negligent, and the negligence of the plaintiff, combining and concurring with the negligence of the defendant, contributed to the injury, and had it not been for the negligence of the plaintiff, so combining with the negligence of the defendant, that injury would not have occurred." That is what simple contributory negligence means. "If I was negligent, the plaintiff also was negligent, and if it had not been for the negli-
17 gence of the plaintiff combining and concurring with our negligence, which contributed to the injury as a proximate cause, the injury would not have occurred." If the evidence does not satisfy you that the defendant or its agent was guilty of negligence or wilfulness, there is no charge; but if you find that the defendant was guilty of negligence, and if you also find that the plaintiff was guilty of contributory negligence, then the contributory negligence of the plaintiff would bar any recovery as against the defendant. If you find that the defendant was also not only guilty of negligence, but was guilty of wilfulness, then if the plaintiff was guilty of negligence, that would not bar a recovery on the part of the plaintiff. And further you will find in this answer that the defendant pleads not only contributory negligence, but that the defendant pleads the affirmative defense of contributory wilfulness. I have tried to define contributory negligence to you. I have told you that contributory negligence simply means this: that while the defendant denies he was negligent in conduct, yet if the defendant was guilty of negligence, the plaintiff was also guilty of negligence in conduct, and that the negligence of the plaintiff combining and concurring with the negligence on the part of the defendant, contributed to the injury, without which the injury would not have

occurred. Contributory wilfulness means this: that while the defendant denies it was wilful in conduct, yet it says this, if the defendant was guilty of wilfulness, the plaintiff was also guilty of wilfulness in conduct, and that the wilfulness of the plaintiff combining and concurring with the wilfulness on the part of the defendant, contributed to the injury, without which contributory wilfulness on the part of the plaintiff, the injury would not have occurred. So, then, I have told you that contributory negligence is no bar to a wilful act, yet contributory wilfulness is a bar to a wilful act on the part of the defendant. If an injury has its origin in simple negligence as a proximate cause, then if the plaintiff, who sustained that injury was himself negligent, then the law says that having its origin in the same measure of proximate cause, the law
18 would leave them where it found them, but if the defendant was wilful in conduct, and the plaintiff only guilty of simple negligence in conduct, any injury occur-ing from that alleged wilfulness would not have its origin in the proximate cause. Proximate cause meets proximate cause. When I say proximate cause I mean in order for the plaintiff to recover that the proximate cause of that injury must have been shown to have been by that wilfulness or negligence alleged in the complaint, without the intervention of some other cause than that which is alleged in the complaint. The plaintiff says because of the negligence or recklessness of the defendant he was injured, "This is the proximate cause upon which I predicate my claim." Then, of course, if that proximate cause had its origin—if the injury was due to some other cause than that complained of in the complaint, you could not say that that alleged in the complaint was the proximate cause. The Court appreciates the difficulty of explaining definitely what is meant by the term, so I have endeavored to make it as plain as I could.

The plaintiff comes into Court here, he has the burden of making out his case according to the allegations of his complaint. You have heard the testimony here. Has the plaintiff here brought testimony sufficient to warrant you in saying that he is entitled to a recovery here at your hands? Has he brought evidence and by the greater weight of that evidence enabled you to say that he is entitled to a verdict at your hands. You take the evidence as it falls from the witnesses on the stand; weigh it in your minds, and if the greater weight of that testimony weighs in favor of the plaintiff, then you say the plaintiff has fulfilled the burden that the law casts upon him. If you find that primarily the plaintiff has made out his case according to the allegations of the complaint, then go forward and take up the consideration of the plea of contributory negligence and contributory wilfulness as charged by the defendant. Those are two affirmative defenses, and the burden is upon the defendant to make them out by the greater weight of the evidence. In other
19 words, Mr. Foreman and gentlemen of the jury, if the plaintiff fails to make out his case by the greater weight of the evidence, then the plaintiff would not be entitled to recover, but in the consideration of the evidence, if you find that he has made out his case according to the allegations of his complaint by the greater

weight of the evidence, then you proceed to take up the defendant's defense as to contributory negligence, and then, if the defendant has made out his plea of contributory negligence, in so far as contributory negligence may apply here, then go further and determine whether or not he has made out his plea of contributory wilfulness, and if he has done that by the greater weight of the evidence, then your verdict will be for the defendant. If he has failed to do that and the plaintiff has made out his case by the greater weight of the evidence, then your verdict will be for the plaintiff.

I have endeavored to cover the general law applicable here, and in order that I may cover any question of law, as suggested by counsel on either side, I shall take up the requests of charge that have been submitted both on the part of the plaintiff and the defendant. The plaintiff requests me to charge as follows:

1. "One who presents himself at the proper place in the proper manner, at the time for transportation, is within the carrier-passenger relation."

I invite your attention to the second request of charge on behalf of the plaintiff:

2. "When one has made a contract for passage upon a vehicle of a common carrier, and has presented himself at the proper place to be transported, his right to care and protection begins."

"The carrier owes to its passengers the duty to use due care to protect them against assaults, insults and humiliation from all others, whether the offenders be employees of the carriers or not."

I charge you those requests, except in so far as the request of charge is to the effect that the carrier owes to the passengers due care. I charge you as a matter of law that the carrier owes to the passenger the highest degree of care. You take that in consideration gentlemen, when you come to consider what constitutes negligence. You will take that into consideration in connection with all I have told you.

The fourth request is:

4. "Mental anguish and humiliation are elements of actual damage."

5. "The fact that an injury is occasioned by wilful and not negligent acts of the servants of a carrier does not excuse the carrier for a failure to carry out its duty to a passanger."

That is correct, and right there I tell you as I already have told you, that the plaintiff is seeking to recover only actual damages, and that is the only damages you can award him, if you award him damages. Actual damages may flow out of a negligent act or wilful act. The plaintiff seeks to recover in this action only actual damages. So, gentlemen, disabuse your minds of any doubt that may be raised there that it is within your province to award punitive damages, because you could not award anything but actual, tangible, measurable damages growing out of this case, if you find that the plaintiff is entitled to recover damages by reason of the negligence or wilfulness of the defendant as a proximate cause of those damages. The defendant's request is:

1. "I charge you and direct that this being an action against the Director General or Agent of the United States Government, then operating the Atlantic Coast Line Railroad Company, you can not find any punitive damages against the United States Government."

That is correct; I have already told you so. Any verdict you may render involving punitive damages would be incompetent, because it is not consistent with this Court. As I said, and I reiterate, that the measure of damages and the only character of damages that you can award in this case, if you award any to the plaintiff, is actual damages. Next request of charge is:

21 2. "I charge you that it is the duty of a passenger, who has, through mistake or misapprehension on the part of the agent of the defendant, been prevented from taking his train on which he held a ticket, to use all means known to him or suggested by any agent of the defendant to minimize his damages."

That is correct, Mr. Foreman and gentlemen of the jury, and you apply it with reference to that element of this case wherein plaintiff is seeking to recover damages by reason of loss to his property that the plaintiff has alleged to have received. The next request of charge is:

3. "I charge you if there was any other way in which plaintiff could have reached his train and any other mode of conveyance at the plaintiff's disposal which he could have reached his destination and met his alleged engagements, it was his duty to have used such means and thus decreased or minimized his alleged damages, and in this case he can only recover such actual damages as he may have sustained after using all efforts practicable to reduce his damages."

That is correct. It is the duty of one who claims damages predicated upon a cause as set forth in a complaint of this character to minimize his damages; to use all reasonable means of minimizing the damages, and thus making the damages as small as possible. I think you will appreciate that distinction when your mind is directed to the request of charge which I have just read.

Now, gentlemen of the jury, I don't think there is anything left that I can say that would illustrate the law and aid you in the consideration of this case. I have endeavored to be explicit in this case at the sacrifice of brevity. I think the less said in presenting a proposition to a jury, the more easily a jury will stand it.

If you find that the plaintiff is entitled to recover here, the form of your verdict will be, "We find for the plaintiff so many dollars actual damages," writing it out in words and not in figures;

22 or, if you find that the plaintiff has failed to make out his case by the greater weight of the evidence as he alleges it in the complaint, and by the measure of the law as I have endeavored to lay it down to you, or if the defendant has made out his plea of contributory negligence or contributory wilfulness by the greater weight of the evidence, the form of your verdict will be "We find for the defendant," and in either case sign your name as foreman.

Mr. Jennings: I ask your Honor to charge the jury this:

"Wounding a man's feelings is as much actual damage as breaking his limbs. The difference is, that one is internal and the other external, one mental, the other physical; in either case the damage is not measurable with exactness. There can be a closer approximation in estimating the damage to a limb than to the feelings, but at the last the amount is indefinite. The jury would have a much wider discretion in dealing with feelings than with an external injury. At common law, compensatory damages include, upon principle, and I think upon authority, salve for wounded feelings, and our code has no purpose to deny such damages where the common law allowed them.

"The allowance of damages for wounded feelings, when they are concomitant, or result of a physical injury is placed rightfully on the ground that the mind is as much a part of the body as the bones and muscles and an injury to the body included the whole and its effects were not separable."

The Court: You are calling my attention to that allegation of the complaint wherein you seek actual damages by way of humiliation?

Mr. Jennings: Yes, sir.

The Court: That is good law. You will find here, Mr. Foreman and gentlemen, wherein the plaintiff alleges his grounds for recovery. He alleges that the defendant humiliated him. That as
2:3 a proximate result of the alleged negligence and wilfulness of the defendant, treatment, that he sets up in his complaint that he received at the hands of the defendant, and whereon he predicates his right to recover, he says that as one of those proximate results he was humiliated. You must look to the evidence to see whether that allegation of the complaint is established here; whether the plaintiff was humiliated by reason of the acts of the defendant as charged in this complaint, is for you to say under the evidence whether that is true. If it is true, then that would be the basis for a recovery of such actual damages as you think the evidence in the case would warrant you in awarding, if you find that the plaintiff has established that allegation of his complaint. Anything else, gentlemen?

Mr. Jennings: I don't think so.

The Court: I give you the complaint and also the answer and in order that you may fully understand the issues here I ask that you read the complaint and then the answer and then take up the consideration of the evidence.

Jury returned a verdict for the plaintiff for ten thousand dollars.

Motion for a New Trial.

A motion for a new trial was made on the following grounds:

1. That although directed to award no punitive damages the jury in effect gave punitive damages, as the amount was far in excess of actual damages sustained as the immediate and proximate result of the injury.

2. The jury obviously ignored his Honor's charge that the passenger must use every reasonable means in his power to minimize his damages.

3. The property damage according to Currie's testimony did not exceed $640.00, and the effect of the opprobrious language of an erratic and excitable, nervous gateman could not have humilated a man of common sense and character, conscious of his own rectitude and propriety of conduct to the extent of nine thousand three hundred and sixty dollars.

24 4. Damages arising from injury to feelings, humiliation etc. cannot be awarded against the United States Government.

5. Verdict out of all proportion and not responsive to the evidence or the charge.

6. Verdict was without evidence to support it and was so excessive as to show it to be the result of whim, passion and prejudice on the part of the jury.

The motion was refused.

Memo. and Order on Motion for New Trial.

This cause was heard before me and a jury at the Fall, 1921, Term of the Court of Common Pleas for Sumter County, resulting in a verdict for the plaintiff in the sum of ten thousand dollars ($10,000.00), and that verdict is now assailed in a motion for a new trial based on six (6) separate grounds which are hereto attached and referred to as a part of this order as Exhibit "A."

The motion raises two salient questions:

1. Did the jury ignore the instructions of the Court and include in their verdict punitive damages which they were specifically instructed they were without authority to do?

2. If the jury followed the instructions of the Court, is the verdict excessive or unsupported by the evidence?

As to the first question, I am persuaded that the jury gave heed to the instructions of the Court, and returned a verdict which they decided was in response to the positive directions of the Court, in-so-far as any consideration of the law is concerned affecting punitive damages.

The other question raised by the motion is of more serious nature, and has occasioned considerable study and examination of authorities, thus postponing the filing of this order beyond a time usually taken for the determination of such matters. I regret this

25 delay, but the interest aroused and the press of many other duties have seemed to justify the apparent delay.

Is this verdict for ten thousand dollars ($10,000.00) actual damages excessive?

The point is raised here suggestive of the position that damages given because of humiliation caused to the plaintiff is in the nature of punishment, and cannot be awarded against the Government.

The jury were charged in effect that humiliation is an element of actual damages. No doubt the jurors understood the distinction the Court endeavored to emphasize, and I am not prepared to say that they, through a misconception of the law or a mistaken zeal in their efforts to adjust, as far as possible, this alleged wrong against the plaintiff, allowed themselves to be influenced by feelings either vindictive or capricious.

The evidence was addressed to the jury to weigh and consider. That evidence, to my mind, presented an example of conduct on the part of the employee, R. L. Crosswell, possible only in an individual only in an individual almost void of the ordinary instincts of manhood, and foreign to a reasonable conception of civil decency and business consideration.

At the time of the trial of this cause, it was started that Crosswell had died after the commencement of the suit, and, with proper respect for the dead, I shall deal with this motion only in that spirit of truth as the facts developed impress me.

The conduct of the plaintiff, whether he was actuated through fear of this autocrat at the gate, or through promptings of innate gentlemanly qualities, presents a case of either commendable discretion or enviable forbearance and self-control, I do not think this plaintiff's conduct can be charged to cowardice. By his subsequent course, and, by the explanation set forth in his testimony, he contends that he has been wronged, and, as an exemplary citizen, appeals to the proper forum for the vindication of his rights. Had
26 he, by force, challenged the right of the gate-keeper to treat him as he contends he was treated, and had he contested the matter by a resort to personal violence, he would have been "taking the law into his own hand," and thus, possible, adding another instance to the list of regrettable, yet sometimes justifiable, tragedies in this State.

To a man of ordinary sensibilities, what is calculated to bring humiliation more than to be set upon in public in such a manner, as this plaintiff claims he was, and assaulted and humiliated by one whose proper function was to guide and help the traveller, rather than to wound and mortify him?

I think the evidence sustains the verdict, and that such a verdict is properly predicated upon the evidence of damages alleged to have been here sustained in conjunction with that which, it is contended, came through humiliation to the plaintiff and a reference to the authorities seems to sustain this position.

In Vol. 8 A. & E. Enc. of Law, page 669, we find that "mental suffering, though not itself a cause of action, it has been said, is a recoverable element of damages when a consequence of some recognized cause of action." And also at page 669 of the same book—"a passenger who is wrongfully ejected from a train may recover in actual damages for circumstances of insult and indignity."

In Vol. 102 Am. State Reports, page 503 (Gillespie vs. Brooklyn Heights R. R. Co.) "No matter what the motive is which incites the servant of the carrier to commit an improper act towards the passen-

ger during the existence of the relation, the master is liable for the act and its nature and legitimate consequences."

In 24 Am. State Reports, page 748 (McKinley vs. Richards), which was an action against a master for injuries received from a malicious assault of his servant, the Court charged that the plaintiff might recover compensatory damages "for the outrage and indignity put upon him," and this declaration was upheld as proper.

27 This may appear to be rather a large actual compensation for the wrongs here complained of, but, if the rights of the law abiding citizens were properly respected, there would be less litigation on the Civil side of the Court, and fewer prosecutions on the criminal side, while the criticising public which now charges the law with failure would probably find the solution of many public ills in a better conception of the rights of the individual citizen and through insistence that none shall invade those rights with impunity or in contravention of the law which governs and protects all alike.

I have read that: "Humility is a virtue all preach, none practice, and yet everybody is content to bear. The master thinks it good doctrine for his servant, the laity for the clergy, and the clergy for the laity," but it may not be improper to amplify this by saying that enforced humiliation strikes at the supreme element of manliness, while the rebuke of submissive courtesy often serves to embolden the aggressor.

This motion has been the occasion of much thought, in the light of the evidence in the case, and the arguments of counsel with the citation of helpful authorities from both sides. I am indebted to counsel for both the plaintiff and the defendants for their courteous assistance throughout the progress of this cause, and I am constrained to hold that the verdict herein ought not to be disturbed.

The motion for a new trial is, therefore, overruled. And it is so ordered.

T. J. Mauldin, Presiding Judge. January 18, 1922, Pickens, S. C.

Exceptions.

I.

His Honor, over the objection of counsel for the defendant, permitted plaintiff to testify what his average gross earnings were

28 per day after his ginneries at Mayesville and at Eutawville began to operate. This constituted error, in that said testimony was purely speculated and incompetent being no measure by which damages could be ascertained for a few days' delay in the institution of said ginneries and before they were established as going concerns.

II.

That his Honor refused to admit the train sheet prepared by despatcher C. W. Bellinger, showing the time of operation of the

train which plaintiff desired to take, and the testimony of C. W. Bellinger based thereon as to the time said train reached Mayesville, on the ground that this evidence, being based on telegraphic reports received from station agents in the course of the train's progress, was hearsay. This constituted error, in that said evidence was competent as the best record in the due course of business of this character kept by the particular train despatcher with jurisdiction over the movement of the particular train.

III.

That his Honor erred in charging that, in arriving at the actual damages suffered by the plaintiff herein, the jury might take into consideration any humiliation occasioned by the action of the gateman. This constituted error, in that the infliction of damages against the United States Railroad Administration for humiliation was improper and in effect constituted the infliction of punitive or exemplary damages against the Government of the United States, contrary to the Acts of the Congress of the United States originating the Government control of railroads, and the Proclamations of the President and orders of the Director General pursuant thereto.

29 IV.

That his Honor erred in charging the jury as follows:

"Wounding a man's feelings is as much actual damages as breaking his limbs. The difference is, that one is internal and the other external, one mental, the other physical; in either case the damage is not measurable with exactness. There can be a closer approximation in estimating the damage to a limb than to the feelings, but at the last the amount is indefinite. The jury would have a much wider discretion in dealing with feelings than with an external injury. At common law, compensatory damages include, upon principle, and I think upon authority, salve for wounded feelings, and our code has no purpose to deny such damages where the common law allowed them. The allowance of damages for wounded feelings, when they are concomitant, or result of a physical injury is placed rightfully on the ground that the mind is as much a part of the body as the bones and muscles and an injury to the body included the whole and its effects were not separable."

This was error, first, in that in this action the plaintiff was not entitled to recover against the United States Railroad Administration for humiliation, and second, in that said charge was upon the facts and contrary to the Constitution of the State of South Carolina.

V.

Because his Honor erred it is respectfully submitted in modifying defendant's second request to charge, which was as follows:

"I charge you that it is the duty of a passenger, who has, through mistake or misapprehension on the part of the agent of the defendant, been prevented from taking his train, on which he held a ticket, to use all means known to him, or suggested by any agent of the defendant, to minimize his damages."

The modification being as follows:

"That is correct, Mr. Foreman, and gentlemen, and you apply it with reference to that element of this case wherein plain-
30 & 31 is seeking to recover damages by reason of loss to his property.

Whereas his Honor should have charged said request as submitted, same being a sound proposition of law; since in so modifying it he unduly limited its legal effect and application to the alleged property loss in this case.

VI.

That his Honor erred in refusing to grant a new trial or reduce materially the verdict in the cause herein, since the verdict was obviously excessive and based upon a capricious interpretation of the law and of the facts on the part of the jury.

Agreement as to Case.

It is hereby agreed that the foregoing shall constitute the "Case" for appeal and exceptions, and that when printed a copy thereof shall be filed in the Supreme Court as and for the return herein; that no other or further return shall be required and that the filing of return in the Circuit Court is waived.

Douglas McKay, Reynolds & Reynolds, Attorneys for Appellant.

L. D. Jennings, M. M. Weinberg, Attorneys for Respondent.

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THE STATE OF SOUTH CAROLINA,
Sumter County:

In the Supreme Court, October Term, 1922.

No. 25.

J. M. CURRIE, Respondent,

vs.

JAMES C. DAVIS, Agent Appointed by the President under Sec. 206 of the Transportation Act of 1920, Appellant.

Reversed Nisi.

Opinion and Judgment.

MARION, *A. J.:*

On Aug. 31st, 1919, at Florence, S. C., the plaintiff purchased a ticket, entitling him to transportation as a passenger on a line of railroad then in charge of the Director General of Railroads of the United States government, from Florence, S. C., to Mayesville, S. C. He then presented himself at the gate through which passengers were required or invited to pass in order to board trains. The gate was in charge of a gatekeeper, a railroad employee, to whom the plaintiff showed his ticket. The gate keeper refused him passage through the gateway and then "shoved" him back, causing him to fall and bruise his arm, in the presence of a "crowd of people." Thereafter the plaintiff made four attempts, at separate times, to get through the gate to his train. Each time he was threatened with physical violence and cursed by the gate-keeper. He then went to the ticket agent, told him of important business plans and arrangements that made it necessary for him to get to Mayesville on the train for which he had bought his ticket. The ticket agent suggested that he try getting through another gate about seventy-
33 five feet away, but which, as plaintiff claimed, "was not for passengers to go through." He told the ticket agent he didn't care to steal through, as he had bought his ticket. He then met Captain Johnson, a conductor for the line of railroad upon which he had taken passage, who upon being apprised of the situation advised him to try the gateman again. He then went back to the gate, again showed the gateman his ticket, and was again repulsed with rude, threatening and insulting language. After that he made one or two more attempts to get through the gate, with the same result. The remarkable story, outlined by the foregoing statement, is the more remarkable in that it is corroborated rather than discredited in essential particulars by the testimony of Conductor Johnson and the

ticket agent, defendant's witnesses at the trial. In an action for damages the plaintiff recovered a verdict for $10,000.00. From judgment thereon the defendant appeals.

Plaintiff claimed that on account of missing his train in Florence he was prevented from getting certain gin machinery installed and erected in due course, as a result of which he was delayed four days in starting two ginneries, one at Mayesville and the other at Eutawville; and that such delay caused him to sustain a certain pecuniary loss which he was entitled to recover as an element of the damages proximately caused by defendant's misconduct. The defendant's first exception imputes error to the trial judge in permitting the plaintiff to testify over objection "what his average gross earnings were per day after his ginneries at Mayesville and at Eutawville began to operate." The contention is that the testimony was "purely speculative and incompetent, being no measure by which damages could be ascertained for a few days delay in the institution of said ginneries and before they were established as going concerns." The exception on this point must be sustained. It is not entirely
34 clear from the evidence printed in the record whether the ginneries in question could be classified as established plants, in the sense that they were old gin stands in which new machinery, in whole or in part, was to be installed for the current ginning season, or whether they were essentially new plants which were in process of establishment for the inauguration of what was for the plaintiff a new business enterprise. If the ginneries were of the character of established industrial or manufacturing plants, then the measure of damages for an interruption in operation, or for delay in starting operations for the cotton season, was the rental value, to be determined in accordance with the rule laid down by this Court in the case of Standard Supply Co. v. Carter & Harris, 81 S. C., 181, 187, in which case the precise question was elaborately considered and clearly decided. In the case at bar there was apparently no attempt to apply the measure of rental value. In any event the data supplied by the evidence affords no adequate basis of fact for applying such measure. Hence, since the evidence is susceptible of the inference, which is assumed as a fact by defendant's exception, that the ginneries were not established plants or going concerns, but were, at the time of the alleged delay, new business enterprises, not yet in active operation, the admissibility of the testimony as to subsequent gross earnings must be determined in accordance with that theory of the facts. In such case the correct measure of damages is thus stated by Mr. Justice Woods, who delivered the opinion of the Court, in McKeekin v. Southern Railway, 82 S. C., 468, 473:

"The plaintiff's business had not been launched, and, therefore, he could not recover profits he expected to make. Tappan & Noble v. Harwood, 2 Speer, 536; Bird v. Tel. Co., 76 S. C., 345, 56 S. E., 973; Standard Supply Co. v. Carter & Harris, 81 S. C., 181. The Mill was not erected and it was impossible to anticipate the conditions which would exist at the time of completion. Indeed, it might be that the mill would never be completed. For these reasons there would be

no reasonably certain basis upon which to compute the measure of damages for rental value, as in the case of the stoppage of a completed ginning plant like that in Standard Supply Co. v. Carter &
35 Harris, supra. The true measure of damages, therefore, in this case, is the loss to the business of constructing a mill—not running a mill. The loss to the business of construction was the interest on the money invested in the work of construction, and the wages of the laborers employed for construction, reduced by the earnings which the plaintiff either received or by reasonable diligence could have received from the employment of such laborers in other work. Saluda Mfg. Co. v. Pennington, 2 Speer, 746."

No adequate consideration, founded upon the evidence, is suggested for not applying that measure of damages to the case at bar. Gross earnings or profits per day after the ginneries started, certainly in the absence of other material facts and circumstances, could afford no reliable, or reasonably fair, test by which to estimate loss of net profits from a delay of four days in starting the gins. Aside from the fact that profits cannot be ascertained from gross earnings alone, every bale of cotton available for ginning during the four days preceding the opening of the ginneries, might actually have been ginned by the plaintiff at the same profit after his gins started. There is no evidence as to local or special conditions tending to establish that as a result of the delay in opening any business was actually diverted to other plants or that plaintiff's output as a whole for the season was in any wise diminished. The amount of the verdict warrants the inference that the jury accepted the only measure of damage tendered them in that aspect of the case—which was plaintiff's estimate of his loss at $160.00 in gross profits per day for one plant, and $175.00 per day for the other, or a total loss of $1,340.00 for the delay of 4 days in starting the two ginneries. As the testimony objected to furnished a basis for the application of that improper measure of damages, its admission was prejudicially erroneous.

The plaintiff's claim that he was delayed four days in starting his ginneries was based primarily upon the assumption of fact that if he had reached Mayesville Sunday night on the train he was prevented from boarding, he could have obtained certain papers and checks which would have enabled him to proceed to Eutawville the
36 following morning and take up the bill of lading and secure delivery from the railroad carrier of his gin machinery which was there awaiting him. The defendant offered the train dispatcher and the train sheets kept by him to prove that the train in question, which was due to arrive at Mayesville about 8 P. M., did not reach there until after midnight, too late for the plaintiff to have transacted his business. This evidence was excluded upon the ground that it violated the hearsay rule. Defendant's second exception imputes error to the trial judge in so ruling. The witness, Bellinger, was the official train dispatcher; the train sheets were the original records made by him in the discharge of his official duty in the ordinary course of business, based upon telegraphic reports trans-

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mitted to him from the various stations by agents whose duty it was personally to observe the facts and to transmit the reports as to the time of arrival and departure of trains. The point raised has not been expressly decided in this State and is one as to which there is a conflict of authority in other jurisdictions. We think the evidence was admissible. The fundamental reasons upon which the numerous well established exceptions to the hearsay rule are based are "circumstantial guaranty of trustworthiness and necessity." II Wigmore on Evidence, Sec. 1420; I Elliott on Ev., Sec. 320. Applying first the test of trustworthiness, we know of no class of records made in "the regular course of duties or business" which are more convincingly verified by the circumstances under which they are made and the character of the entries themselves. It is a matter of common knowledge that the train dispatcher of a railroad is the field officer upon whose orders depend the movement of all trains upon a line, a division or a system. In a figurative but apposite sense it may be said that, by day and by night, the train dispatcher rides as the super-pilot upon every locomotive that pulls freight and passengers through cut and tunnel, over fill and bridge, from station to
37 station, between distant termini. Grave public interests, dependent upon the prompt carriage of mails and the uninterrupted flow of commerce, the safety of property, and the lives of crews and passengers are staked upon the correctness and reliability of a train dispatcher's orders. These orders are based upon the information secured by personal observers transmitted by telegraph or telephone, entered upon the train sheets, and thereafter relied upon by the train dispatcher as "chart and compass" in guiding and controlling the movement of distant trains. In this connection the language of the Massachusetts Court in the case of Donovan v. Boston etc. R. R. Co., 158 Mass., 450, 33 N. E., 583, is pertinent:

"It is clear that the sheet was worse than useless if its statements, as seen by the dispatcher, were not accurate. Every interest of the defendant demanded that an entry when made should be true, and no reason can be conceived why the defendant should procure or permit a false or incorrect entry to be placed under the eye of the official who controlled the movement of its trains; nor is there any reason to presume that the operator who observed the passing of the train at the station and telegraphed the information to the dispatcher's office, or the person who there received the message and made the entries on the sheet had any interest to mistake the facts or to make false entries. The system was the established course of the defendant's business, so that the sheet was not an accidental memorandum, and every step by which the information spread upon it was gathered, transmitted and entered, was an act performed by some person in the line of his duty and in the usual course of his employment under a sanction tending to make his statements true, and these acts were so connected with and dependent upon each other as to form parts of one transaction."

In discussing the admissibility of entries of this general character, Professor Wigmore says: "When it is a mere question of whether

provisional confidence can be placed in a certain class of statements there cannot profitably and sensibly be one rule for the business world and another for the courtroom." Wigmore on Ev., Sec. 1530. We think the entries upon a dispatcher's train sheets, recognized and relied upon as safe in the operation of a great and complicated business, very fully meet the test of the "circumstantial guaranty of trustworthiness." Likewise we are of the opinion that such entries satisfactorily meet the test of necessity. As is said by Mr.
38 Justice Connor in an elaborate and well considered opinion upon this precise question in the case of Fireman's Insurance Co. v. Seaboard Air Line Ry. (N. C.), 50 S. E., 452, 107 A. S. R., 517, "Professor Wigmore suggests that when an entry is made in the usual course of business based upon reports made by one whose duty it is to make such report, but who is not required to make and keep any record of the transaction, the entry so made is admissible upon the ground of necessity growing out of the fact that it is not to be expected that the person making such report would remember the fact reported—and *and* that he is therefore unavailable in a legal sense. It is not to be expected that an operator, who reports to the dispatcher the time of arrival and departure of a number of trains daily could undertake to testify from memory the hour and minute of each arrival or departure. He has no duty imposed upon him to do so. If he did undertake to testify, as in this case, three years after the event, but little credence would be attached to his testimony. For practical purposes he is as essentially unavailable as if dead or insane." In the case at bar the trial was had more than two years after the date upon which the particular train in question arrived at Mayesville. The practical necessity for the admission of the train sheets, grounded upon the considerations above suggested, is apparent. As the evidence offered was more or less relevant to a material issue of fact, its exclusion was prejudicially erroneous, and the appellant's second exception must be sustained. See generally Seaboard Air Line Ry. Co. v. Earle, 86 S. C., 91; J. L. Mott Iron Works v. Kaiser, 103 S. E., 783; State v. Stephenson (Kan.), 105 Am. St. R., 171; Scott v. Astoria R. R. Co. (Ore.), 99 Am. St. R., 710; Ferrebee v. Berry (N. C.), 84 S. E., 262; Erk v. Simpson (Ga.), 103 S. E., 783.

The appellant's third point (exceptions 3, 4 and 6) is directed to the contention that the trial Court erred in holding that the plaintiff was entitled to recover damages for humiliation in the
39 action at bar against the sovereign power. It is conceded that under the Federal Control Act and under the orders issued pursuant thereto by competent executive authority, all damages which may be properly classified as actual or compensatory are recoverable in an action against the Director General or other duly authorized agent of the government. But, it is argued that the damages recovered in this action for alleged injury to feelings or for humiliation caused by the wrongful conduct of defendant's gateman were "nothing more nor less than an award of punitive damages" under the guise of compensation. That contention is rested pri-

marily on the construction of the Federal law adopted by the Supreme Court of the United States in Missouri Pacific R. Co. v. Ault, 255 U. S., 552, 65 L. Ed. 1087, 1092, and clearly expressed as follows: "Wherever the law permitted compensatory damages, they may be collected against the carrier while under Federal control. * * * But double damages, penalties and forfeitures, which do not merely compensate but punish, are not within the purview of the statute." There can be no doubt that under the settled law of this jurisdiction, prior to the passage of the Federal Control Act, such breach of the carrier's duty to a passenger as proximately caused the infliction of injury to feelings, mental suffering or humiliation, even in the absence of physical injury, afforded an adequate legal foundation for the award of actual or compensatory damages. Lipman v. A. C. L. R. Co., 108 S. C., 151; Cave v. Ry. Co., 94 S. C., 282; Adams v. Ry. 103 S. C., 327. That view, as pointed out by Mr. Justice Hydrick in Lipman v. R. Co., supra, is in accord with the overwhelming weight of reason and authority. In the case of Gillespie v. B. H. R. Co., 178 N. Y., 347, 102 A. S. R. 503, the New York Court considers the question, and very fully reviews the authorities, as to whether damages for humiliation suffered because of such breach of the carrier's duty are properly recoverable as compensatory damages, and arrives at a conclusion in accord with the following statement of the law quoted from Thomson on Negligence, Sec. 3288:

"Damages given on the footing of humiliation, mortification, mental suffering, etc., are compensatory, and not exemplary damages. they are given because of the suffering to which the passenger has been wrongfully subjected by the carrier. The quantum of this suffering may not and generally does not depend at all upon the mental condition of the carrier's servant, whether he acted honestly or dishonestly, with or without malice."

See Joyce on Damages, Sec. 354; 4 R. C. L., 1174, 1175. In the case at bar there was evidence tending to establish a breach of the contract of carriage by tortious conduct subjecting a passenger to the indignity of assault and battery, insult and contumely. For the injury to his feelings, humiliation and mental suffering thus inflicted upon the plaintiff by the servants of a carrier under the control of the Director General of Railroads, we are clearly of the opinion that compensatory damages were recoverable. The case at bar was properly tried upon that theory in the Court below, and, while the amount of the verdict is unquestionably large, we are not prepared to hold that the award is so excessive as clearly to indicate a punitive purpose or primarily to entail a penal consequence. The assessment of unliquidated damages for an injury of this character cannot proceed by rule and must rest in the sound discretion of the jury, controlled by the discretionary power of the Circuit Judge, in the tribunal appointed by law to try the facts. There is no market value for injured feelings. The value of money in comparison with the value of the normally self-satisfied state of mind

of which a man may be deprived by a wrongful invasion of his rights, a trampling upon the sensitive tentacles of his personal dignity, a public aspersion upon his manhood, or by abusive treatment of any character, is a matter as to which reasonable men may—and do—differ widely. The verdict was approved by the Circuit Judge as an award of compensatory damages. His conclusion cannot be held erroneous as a matter of law. See generally Bing v. R. Co., 86 S. C., 530; Huggins v. Railroad Co., 96 S. C., 267; Yar-
41 borough v. Electric Co., 100 S. C., 33; Southerland v. Davis (this term); Southern Ry. v. Bennett, 233 U. S., 81.

In submitting the case upon the theory that actual damages for humiliation were recoverable the Circuit Judge approved as "good law" a request to charge, read by plaintiff's counsel, to the effect that "wounding a man's feelings is as much actual damage as breaking his limbs;" that "the difference is that one is internal and the other external, the one mental, the other physical;" that "in either case the damage is not measurable with exactness," but since a closer approximation could be made in estimating damage to a limb "the jury would have a wider discretion in dealing with feelings than with an external injury," etc. The only objections to that instruction urged by appellant are (1) that the "plaintiff was not entitled to recover against the United States Administration for humiliation" and (2) that "said charge was upon the facts and contrary to the Constitution of South Carolina." While the charge as framed may be open to criticism we do not think the objections suggested are valid. The first has already been disposed of. As to the second, we see no ground for appellant's contention that the Court charged as a fact that the plaintiff's feelings had been wounded and directed that the jury award the same amount of damages as if the plintiff's body had been mutilated. Further, the record discloses that while the trial judge approved the request as a proposition of law, he followed that comment by very clear directions to the jury that they "must look to the evidence to see whether that allegation of the complaint (as to humiliation) is established here," etc., and "if it is true, then that would be the basis for a recovery of such actual damages" as they might "think the evidence in the case would warrant" them in awarding, etc. Certainly, as thus safeguarded, the instruction may not properly be condemned as a charge on the facts in violation of the Constitutional inhibition in
42 that regard. See State v. Hays, 113 S. E., 362.

The defendant requested the trial Court to charge "that it is the duty of a passenger, who has, through mistake or misapprehension on the part of the agent of the defendant, been prevented from taking his train, on which he held a ticket to use all means known to him, or suggested by any agent of the defendant to minimize his damages." Error is assigned (exception 5) in that the Circuit Judge responded to the request as follows: "That is correct, Mr. Foreman and gentlemen, and you apply it with reference to that element of this case wherein plaintiff is seeking to recover damages by reason of loss to his property." Appellant contends that under

the facts of this case the law imposed upon the plaintiff the duty to minimize his damages, in so far as they were due to humiliation resulting from the gatekeeper's first rejection, by not thereafter subjecting himself to affront by repeatedly approaching the Cerberus at the gate, or by accepting the ticket agent's kindly suggestion that he try a flanking movement. We think the law applicable in that aspect of the case was the rule of contributory negligence or wilfulness rather than the principle as to mitigation or reduction of damages. But, if the latter principle were applicable, the avoidable consequential damages which the defendant was entitled to have eliminated from the consideration of the jury were only such as could have been avoided by the injured party in the exercise of proper care. 17 C. J., pg. 926, Sc. 224. In any view the requested instruction was faulty in imposing the duty to use all known or suggested means to minimize damages irrespective of the applicable standard of reasonableness or due care, and appellant is not in position to complain of the modification as prejudicial error.

From the foregoing consideration of appellant's points it appears that the only reversible errors of law disclosed by the record
43 relate wholly to the measure and assessment of the pecuniary damages alleged to have been sustained by the plaintiff from the delay in starting his ginneries caused by his failure to reach Mayesville on the train he was prevented from boarding. If the extent to which those errors affected the verdict were indeterminate the defendant would unquestionably be entitled to a new trial generally. But the portion of the whole damages attributable to the plaintiff's alleged business loss is sharply segregated by the evidence and may be definitely computed upon a mathematical basis. According to the plaintiff's own testimony, the only evidence adduced, his business loss could not have exceeded the sum of $1,340.00, the aggregate of the estimated profits from four days' operation of his ginneries. In that state of the record the disposition of the appeal presents a question essentially similar to that involved in an appeal from judgement upon a verdict separately assessing actual and punitive damages or specifically finding definite amounts for distinct items of a claim. In such case it is within the discretionary power of this Court to affirm or reverse in part or upon conditions that will effectually serve to correct the errors of law disclosed. 4 C. J., p. 1137, Secs. 3135, 3148; Gray & Shealy v. Railway Co., 81 S. C., 370; Riley v. Railway, 81 S. C., 387; Blowers v. Railway, 74 S. C., 221, 231; Vance v. Ferguson, 101 S. C., 125, 134; Ellison v. Railway Co., 94 S. C., 425, 433; Calhoun v. Sou. Ry. Co., — S. C., —, 106 S. E., 780; Massey v. Hines, — S. C.,—, 108 S. E., 180; Ransen v. Boyd, 161 U. S., 397, 40 L. Ed. 746. There can be no doubt that a remission in full by the appellee of such portion of the verdict as could have been affected by the erroneous rulings of the trial judge would correct or cure the errors involved in the judgment here appealed from. Since it is in the public interest, as well as to the interest of parties to actions, that litigation should be
44 shortened and that appeals should not delay the accomplishment of substantial justice, we are of the opinion that the

appropriate judgment upon this appeal is the award of a new trial nisi.

It is accordingly ordered that the judgment of the Circuit Court be reversed and a new trial granted, unless the plaintiff shall within 10 days after the filing of the remittitur in the Circuit Court remit on the judgment record, as of the date of the verdict, the sum of Thirteen Hundred and forty Dollars ($1,340.00), and that upon the entry of such remission the judgment of the Circuit Court stand affirmed.

Reversed, nisi.

We concur.

Eugene B. Gary, C. J. R. C. Watts, A. J.
T. B. Fraser, A. J.

Justice Cothran did not participate.

45 THE STATE OF SOUTH CAROLINA:

In the Supreme Court, Third Circuit, Sumter County.

Hon. T. J. Mauldin, Presiding Judge.

[Title omitted.]

Petition for Amendment to Opinion and Judgment.

Your petitioner, the defendant, James C. Davis, Agent appointed by the President under Sec. 206 of the Transportation Act of 1920, respectfully shows:

1. That on the 26th day of February, 1923, this Honorable Court rendered a decision in the above entitled cause, wherein and whereby the judgment of the lower court was reversed and a new trial granted, unless the plaintiff should, within ten days after the filing of the remittitur in the Circuit Court, remit on the judgment record, as of the date of the verdict, the sum of thirteen hundred and forty dollars ($1,340.00), and that upon the entry of such remission the judgment of the Circuit Court should stand affirmed.

2. That the balance of the judgment, to-wit, eight thousand six hundred and sixty dollars ($8,660.00), which is affirmed, consists of damages awarded for humiliation and wounded feelings, which your petitioner, both in the trial court and in the appeal to this Court, contended could not be the basis of a recovery against the defendant, since the action was in effect one against the Government and could be brought only within the limitations of the Act of Congress generally known as the Transportation Act of February, 1920, and which Act does not permit a finding of the nature herein referred to.

46 3. That by virtue of the provisions of the decree of this Court, the judgment it has rendered does not become a final

judgment until after the remittitur is returned to the lower court and the highest Court of the State loses jurisdiction thereof. That this condition seriously embarrasses and perhaps impairs the right of your petitioner to have reviewed by the Supreme Court of the United States this Court's construction of a Federal statute, since in its present status the decree of this Court is not a final judgment, and when its decree does become final this Court will have lost jurisdiction on the judgment.

4. That the judgment herein against the contentions of James C. Davis, Agent appointed by the President under Section 206 of the Transportation Act of 1920, denies to him the equal protection of the laws, in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States, and is against the right, title, privilege and immunity of the said James C. Davis, Agent appointed by the President under Section 206 of the Transportation Act of 1920, under the Act of Congress herein above referred to.

5. That under the provisions of Section 237 of the Judicial Code of the United States, as amended by the Act of September 6, 1916 (39 Stat. L., 726), your petitioner is entitled to apply to the Supreme Court of the United States within ninety days for a writ of certiorari to this Honorable Court, or for such other requisite procedure as may be deemed proper, in order to have reviewed the decision of this Honorable Court against such right, title, privilege or immunity so claimed by him under the Constitution of the United States and the Act of Congress aforementioned.

Wherefore, Your petitioner prays that this Court do amend its opinion, so that the plaintiff may be required to stipulate
47 whether he consents to the remission provided for before the remittitur is sent down to the lower Court, and furthermore that this Court do stay the remittitur for such time as to allow the plaintiff to effect his choice in this matter, and the defendant to exercise his right of seeking by requisite proceedings to have the judgment of this Court reviewed by the Supreme Court of the United States, and your petitioner will ever pray.

Thomas W. Davis, Douglas McKay, Attorneys for Petitioner.

48 State of South Carolina,
County of Richland:

I hereby certify that I am not concerned in this cause, and that there is merit in the grounds of the petition herein.

(Sgd.) C. B. Elliott, Attorney at Law.

49 THE STATE OF SOUTH CAROLINA:

In the Supreme Court, Third Circuit, Sumter County.

Hon. T. J. Mauldin, Presiding Judge.

[Title omitted.]

Order Staying Remittitur.

Upon hearing the petition of James C. Davis, Agent appointed by the President under Section 206 of the Transportation Act of 1920, in this action for a stay of remittitur, and upon motion of Thomas W. Davis and Douglas McKay, attorneys for said petitioner,

It is ordered that the remittitur herein be, and the same is hereby, stayed until the further order of this Court. 8th March, 1923.

(Sgd.) J. H. Marion, Associate Justice of the Supreme Court of South Carolina.

50 THE STATE OF SOUTH CAROLINA:

In the Supreme Court, Third Circuit, Sumter County.

[Title omitted.]

Order Amending Opinion and Judgment.

Per Curiam:

Upon consideration of the within petition, it is ordered that the opinion heretofore filed in the within cause be modified by amending the judgment therein incorporated to read as follows:

"It is accordingly ordered that the judgment of the Circuit Court be reversed and a new trial granted unless the plaintiff shall within ten days from April 14th file with the Clerk of this Court a stipulation in writing agreeing to remit on the judgment record in the Circuit Court, as of the date of the verdict, the sum of Thirteen Hundred and Forty Dollars ($1,340.00), and that, upon the filing in this Court of such stipulation to remit, the judgment of the Circuit Court stand affirmed, as herein modified."

It is further ordered, that the remittitur herein be stayed until the 14th day of May, 1923.

Eugene B. Gary, C. J. R. C. Watts, A. J.
T. B. Fraser, A. J. T. P. Cothran,
A. J. J. H. Marion, A. J.

51 THE STATE OF SOUTH CAROLINA:

In the Supreme Court, Third Circuit, Sumter County.

[Title omitted.]

Remittitur of J. M. Currie.

[Filed Apr. 23, 1923.]

The Plaintiff-Respondent, J. M. Currie, hereby agrees to remit on the Judgment record in the Circuit Court, as of date of the verdict, the sum of One Thousand Three Hundred Forty and no/100 Dollars. This remittance is intended to be in accordance with the terms of the Per Curiam order of the Supreme Court in the above entitled cause, and to prevent a new trial in said case.

J. M. Currie, By (Sgd.) L. D. Jennings, His Attorney. [Seal of Supreme Court of South Carolina.]

Sumter, S. C., April 21, 1923.

[File endorsement omitted.]

52 THE STATE OF SOUTH CAROLINA:

In the Supreme Court, Third Circuit, Sumter County.

[Title omitted.]

Clerk's Certificate to Record.

I, Harry McCaw, Clerk of the Supreme Court of the State of South Carolina, do hereby certify that the foregoing consisting of fifty-one numbered pages, is a true and complete transcript of the entire record in the case herein on appeal to this Court, comprising the record on appeal from the Court of Common Pleas for Sumter County to this Court, the opinion of this Court and the judgment thereon, the petition of the appellant for a stay of the remittitur and for an amendment of the opinion and judgment, the order of this Court staying the remittitur, the order of this Court amending its opinion and judgment, and the stipulation of the respondent filed in this Court 23rd April, 1923.

In witness whereof I have hereunto set my hand and seal, this 30 day of April, 1923.

Harry McCaw, Clerk of the Supreme Court of the State of South Carolina. [Seal of Supreme Court of South Carolina.]

53 [File endorsement omitted.]

STATE OF SOUTH CAROLINA:

In the Supreme Court

[Title omitted]

I, Harry McCaw, Clerk of the Supreme Court of the State of South Carolina, do hereby certify the transcript of the record of the proceedings in this Court of the above entitled cause, heretofore certified by me for filing in the Supreme Court of the United States, was correct and complete as the same then appeared in this Court. In pursuance of the command of the writ of certiorari issued out of the Supreme Court of the United States and directed to the Supreme Court of the State of South Carolina dated 23rd day of June, 1923, I now hereby certify that on the 11th day of July, 1923, there was filed in my office, a stipulation in the above entitled cause, a copy of which is hereto attached. I further certify that the attached is a true and correct copy of said stipulation and of the whole thereof.

Witness my Official Signature and the Seal of the said the Supreme Court of the State of South Carolina, this 11th day of July, 1923, in the City of Columbia, State aforesaid.

Harry McCaw, Clerk of the Supreme Court of South Carolina. [Seal of Supreme Court of South Carolina.]

STATE OF SOUTH CAROLINA:

In the Supreme Court

[Title omitted]

STIPULATION

It is hereby stipulated between the Appellant, James C. Davis, Agent, appointed by the President under Section 206 of the Transportation Act of 1920, and the Respondent, J. M. Currie, that the transcript of record filed in the office of the Clerk of the Supreme Court of the United States with the petition for writ of certiorari, be taken as the return to said writ, dated the 23rd day of June, 1923.

Thos. W. Davis, Douglas McKay, Attorneys for Appellant.
L. D. Jennings, Attorney for Respondent.

Filed 11 July, 1923. A true copy. Attest: Harry McCaw, Clerk. [Seal of Supreme Court of South Carolina.]

UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of South Carolina, Greeting:

Being informed that there is now pending before you a suit in which James C. Davis, Agent appointed by the President under Section 206 of the Transportation Act of 1920, is appellant, and J. M. Currie is respondent, which suit was removed into the said Supreme Court by virtue of an appeal from the Court of Common Pleas for Sumter County, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Supreme Court and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the twenty-third day of June, in the year of our Lord one thousand nine hundred and twenty-three.

Wm. R. Stansbury, Clerk of the Supreme Court of the United States.

[File endorsement omitted.]

FILED
MAY 4 1923
WM. R. STANSBURY
CLERK

No. 1054 [redacted] 60

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1922.

JAMES C. DAVIS, AGENT APPOINTED BY THE PRESIDENT UNDER SECTION 206 OF THE TRANSPORTATION ACT OF 1920, PETITIONER,

against

J. M. CURRIE, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

THOS. W. DAVIS,
DOUGLAS McKAY,
Counsel for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1922.

JAMES C. DAVIS, AGENT APPOINTED BY THE PRESIDENT UNDER SECTION 206 OF THE TRANSPORTATION ACT OF 1920, PETITIONER,

against

J. M. CURRIE, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Supreme Court of the United States:

Your petitioner, James C. Davis, agent appointed by the President under section 206 of the Transportation Act of 1920, deeming himself aggrieved by a certain decree or order of the Supreme Court of the State of South Carolina, entered in the case of J. M. Currie, respondent, against James C. Davis, agent appointed by the President under section 206 of the Transportation Act of 1920, appellant, which decree or order became final for the purposes of review in this court on the 13th day of April, A. D. 1923, prays this Honorable Court to issue its writ of certiorari as authorized so to do by the provisions of section 237 of the Judicial Code as amended by the Act of Congress of 23d December, 1914, c. 2, Act 6th

September, 1916, c. 448, Sec. 2, and Act 17 February, 1922, c. 54, 42 Stat., 366, addressed to the Supreme Court of the State of South Carolina commanding it to certify and transmit to this court, on a day therein named, a full and complete transcript of the record and all proceedings had in the various courts of the State of South Carolina in said cause, in so far as the same appear of record or on file in said Supreme Court of the State of South Carolina, to the end that said cause may be reviewed and determined by this court, as provided by law, and that petitioner may have such relief and remedy in the premises as this court may deem appropriate, and justice and right may require.

The reasons relied on for the issuance of said writ and upon which your petitioner believes that a writ ought to be issued, and which will be more fully stated hereafter, may be summarized as follows:

I.

1. Because the Supreme Court of the State of South Carolina misinterpreted the Federal Control Act of 21st March, 1918 (40 U. S. Stat., 451, C. 25, sec. 10), and the proclamations of the President issued pursuant thereto, and the general orders promulgated by the director general of railroads pursuant to the authority duly vested in him, particularly general orders Nos. 8 and 50 (U. S. Railroad Administration Bulletin No. 4, pp. 167 and 334), in holding that respondent was entitled to recover damages against the United States Railroad Administration for injury to feelings and humiliation within the meaning of the act and the proclamations and general orders issued pursuant thereto at the time the injury was inflicted.

2. Because the opinion of the Supreme Court of the State of South Carolina is contrary to the decisions of this court and of the inferior Federal courts, construing the nature and extent of recovery permitted against the United States Railroad Administration under the terms of the Federal Control Act, and amplifies and extends the right of recovery beyond the limitations of the act.

II.

The matters involved and the facts and circumstances are as follows:

On 31st August, 1919, at Florence, S. C., the respondent purchased a ticket, entitling him to transportation as a passenger on a line of railroad then in charge of the Director General of Railroads of the United States Government, from Florence, S. C., to Mayesville, S. C. He then presented himself at the gate through which passengers were required or invited to pass in order to board trains. The gate was in charge of a gatekeeper, a Government employee, to whom the respondent showed his ticket. The gatekeeper refused him passage through the gateway and then, according to the respondent, "shoved" him back, causing him to fall and bruise his arm, in the presence of a "crowd of people." Thereafter the respondent made four attempts, at separate times, to get through the gate to his train. Each time he was threatened with physical violence and cursed by the gatekeeper. He then went to the ticket agent, told him of important business plans and arrangements that made it necessary for him to get to Mayesville, S. C., on the train for which he had bought his ticket. The ticket seller suggested that he try getting through another gate about

seventy-five feet away, but which, as respondent claimed, "was not for passengers to go through." He told the ticket agent he didn't care to steal through, as he had bought his ticket. He then met Captain Johnson, a conductor for the line of railroad upon which he had taken passage, who, upon being apprised of the situation, advised him to try the gateman again. He then went back to the gate, again showed the gateman his ticket, and was again repulsed with rude, threatening and insulting language. After that he made one or two more attempts to get through the gate, with the same result.

The respondent brought suit for damages because of the wrongful and wilful violation of his rights by the gatekeeper against the petitioner, claiming damages for business losses caused by the enforced delay, and for the wounded feelings and the humiliation suffered. Due objection was made in the trial court that the evidence as to business losses was irrelevant and insufficient, and that as to wounded feelings and humiliation was incompetent, since a recovery of this nature could not be had against the United States Railroad Administration. The trial court overruled these grounds and submitted the case to the jury, which found a verdict of $10,000.00.

The Supreme Court of South Carolina, on appeal, overruled petitioner's exceptions to the allowance of damages for wounded feelings and humiliation, but sustained the exceptions as to the allowance of damages for business losses on the evidence offered, and therefore reversed the judgment, unless the plaintiff should remit from the face of the judgment $1,340.00, which represented alleged business losses, within ten days after the remittitur went down to the lower

court. The court, however, before it lost jurisdiction of the judgment, stayed the remittitur, took under consideration a petition filed by your petitioner, reconsidered its opinion, and on 13th April, 1923, filed an amended decree, whereby it provided that the respondent should file his stipulation of remission in the Supreme Court within ten days, in order that the judgment might become a final judgment in and of that court.

On the 23d day of April, 1923, the respondent filed in the Supreme Court a stipulation, acquiescing in the condition imposed by the decree of the court, remitting from the face of the judgment the sum of $1,340.00, whereupon the decree became a final judgment of the Supreme Court of the State of South Carolina.

III.

The sole question presented for review by this court is, Can damages for humiliation and wounded feelings be awarded the respondent against the petitioner, the United States Railroad Administration, under the provisions of the Federal Control Act, the proclamations of the President and the general orders of the director general pursuant thereto? This point having been raised in his appeal to the Supreme Court of the State of South Carolina, and having been decided adversely to the rights and interest of your petitioner and contrary to the decisions of this court, a review thereof is hereby prayed.

WHEREFORE, because and by reason of the general interest in and the general importance of the issues involved, and for the other reasons above stated, your petitioner prays

that a writ of certiorari to review the cause be issued to said Supreme Court of the State of South Carolina, as in such case is provided by section 237 of the Judicial Code as amended by the act of Congress of 23d December, 1914, c. 2, act of 6th September, 1916, c. 448, sec. 2 and act 17th February, 1922, c. 54, 42 Stat., 366.

JAMES C. DAVIS,
Agent Appointed by the President under Section 206 of the Transportation Act of 1920,
Petitioner,

By THOS. W. DAVIS,
Wilmington, N. C.,

DOUGLAS McKAY,
Columbia, S. C.,
His Attorneys.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1922.

JAMES C. DAVIS, *Agent Appointed by the President under Section 206 of the Transportation Act of 1920, Petitioner,*

against

J. M. CURRIE, *Respondent.*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Statement of Facts.

The essential facts involved in this application have been referred to in the petition. J. M. Currie, by the unlawful and wilful actions of a gateman in the employ of the United States Railroad Administration, was caused to miss his train for which he had purchased a ticket. Paragraph IX of the complaint summarizes his claim for damages as follows:

> "That said defendants by and through said R. L. Crosswell wilfully and wantonly and maliciously prevented plaintiff from taking this train, cursed, assaulted and abused plaintiff, caused him great humiliation, the loss of two days' time, and damaged him by reason of his failure to take up said machinery on demurrage and by reason of having his laborers idle on account thereof, and that the acts of the said defendants in so refusing to admit plaintiff to his train and in so cursing, assaulting, and abusing plaintiff, jointly and severally, caused and occasioned plaintiff damages in the sum of $50,000.00."

By the very allegations of his complaint, the respondent bases his claim upon the wilful, wanton, and malicious acts of the gateman Crosswell, and for such acts seeks to recover.

DAMAGES CANNOT BE RECOVERED AGAINST THE GOVERNMENT FOR WOUNDED FEELINGS AND HUMILIATION ARISING OUT OF A WANTON, WILFUL, AND MALICIOUS ACT OF ITS AGENT.

The Supreme Court of South Carolina determined that the verdict of $10,000 was made up of $1,340 for actual business losses and $8,660 for humiliation and injured feelings, and there is affirmed a judgment in the latter amount against the United States Government because the humiliation and wounded feelings were caused by delicts of a servant who, according to respondent's complaint, acted "wilfully and wantonly and maliciously."

General Order No. 8 of the director general of railroads provided in part as follows:

> "Now that the railroads are in the possession of the Government, it would be futile to impose fines for violations of said laws and orders upon the Government, therefore it will become the duty of the Director General in the enforcement of said laws and orders to impose punishments for wilful and inexcusable violations thereof upon the person or persons responsible therefor, such punishment to be determined by the facts in each case." (U. S. Railroad Administration Bulletin No. 4, pp. 167-168.)

General Order No. 50, quoting the requisite section of the Federal Control Act and making provision for suits thereunder, in the portions pertinent hereto provided as follows:

"Whereas by the proclamations dated December 26, 1917, and April 11, 1918, the President took possession and assumed control of systems of transportation and the appurtenances thereof, and appointed the undersigned, William G. McAdoo, Director General of Railroads, and provided in and by said proclamations that 'until and except so far as said director 'shall from time to time otherwise by general or 'special orders determine, such systems of transporta-'tion shall remain subject to all existing statutes and 'orders of the Interstate Commerce Commission and 'to all statutes * * * but any orders, general or 'special, hereafter made by said director shall have 'paramount authority and be obeyed as such'; and

"Whereas the act of Congress, called the Federal Control Act, approved March 21, 1918, provided that 'carriers while under Federal control shall be sub-'ject to all laws and liabilities as common carriers, 'whether arising under State or Federal laws or at 'common law, except in so far as may be inconsistent 'with the provisions of this act or any other act ap-'plicable to such Federal control, or with any order 'of the President'; * * *

"It is therefore ordered, that actions at law, suits in equity, and proceedings in admiralty hereafter brought in any court based on contract, binding upon the director general of railroads, claim for death or injury to person, or for loss and damage to property, arising since December 31, 1917, and growing out of the possession, use, control or operation of any railroad or system of transportation by the Director General of Railroads, which action, suit, or proceeding, but for Federal control might have been brought against the carrier company, shall be brought against William G. McAdoo, Director General of Railroads, and not otherwise; *provided, however,* that this order

> shall not apply to actions, suits, or proceedings for the recovery of fines, penalties, and forfeitures." (*Id.*, pp. 334, 335).

Thus it is apparent that, under neither the Federal Control act nor the General Orders issued pursuant thereto, did the United States Government permit itself to be sued for the wilful, wanton, malicious acts of its servants, for which the damages awarded would be punitive in nature. *Missouri Pacific R. Co. vs. Ault,* 256 U. S., 554; 65 L. Ed., 1087; *Massey vs. Hines* (S. C.), 108 S. E., 181; *Ginn vs. Hines* (S. C.), 103 S. E., 548.

Merely as evidence that the spirit and atmosphere of the action and of the trial was one of punishment of the petitioner for the malice and wantonness of his servant, note the language of portion of the order of the trial judge refusing a new trial:

> "This may appear to be rather a large actual compensation for the wrongs here complained of, but, if the rights of the law abiding citizens were properly respected, there would be less litigation on the civil side of the court, and fewer prosecutions on the criminal side, while the criticising public which now charges the law with failure would probably find the solution of many public ills in a better conception of the rights of the individual citizen and through insistence that none shall invade those rights with impunity or in contravention of the law which governs and protects all alike." (Case, p. 27, f. 105.)

This language shows clearly that the trial judge was imbued with the idea that a verdict rendered as punishment for a wilful act could be found against the Government. This

court, however, in *Missouri Pacific R. Co. vs. Ault,* 256 U. S., 554, 654; 65 L. Ed., 1087, 1092, has decided: "The purpose for which the Government permitted itself to be sued was compensation, *not punishment.*" (Italics ours.) It does not consent to be sued in a class of cases where there is alleged element of moral wrong on its part, or in any class of cases involving the element of moral wrong where the intent or motive has its origin in a lack of consideration for the rights of an individual, and where the damages awarded are based upon mental anguish or humiliation attributable to such acts.

This is based upon an interpretation of Federal law, and hence the adjudications of the Federal courts are binding. In the case of *Pearl Dougherty vs. Payne as Director General of Railroads,* 276 Fed., 451, the District Court for the Southern District of Florida decided as follows:

> "This cause comes on for hearing upon the motion for leave to file an amended declaration.
>
> "Heretofore on May 27th, inst., a demurrer was sustained to the declaration.
>
> "The 5th ground of the demurrer raised the question whether an action for malicious prosecution could be brought against the Director General of Railroads, as such officer, for the actions of one of the employees of a railroad system under his control. A careful study of the acts of Congress covering the governmental control of transportation systems seems to me to answer this question in the negative. Such being my view, no purpose would be served in granting the motion to amend and it will therefore be denied."

This decision was handed down 9th June, 1921, and, as we are informed, the action was brought for the malicious

prosecution of a linen counter, employed by the Pullman Car Lines at Jacksonville, Florida. Her arrest was procured at the instance of employees of the Pullman lines. She was acquitted by a jury and brought suit for malicious prosecution.

In the case of *Hines vs. Bowling,* 272 Fed., 230, suit was instituted to recover damages for malicious prosecution. The question involved in this case was referred to by Judge Boyd in his opinion, but was not passed upon. Judge Boyd stated:

> "The question which arises is whether or not, under such circumstances, malice or wrongful motive can be imputed to the Chief Executive, who was performing an official function, or to the director general, his *alter ego,* and made the ground of damages at the instance of an individual in a suit against the latter. However, this proposition was not relied upon, nor argued by defendant's counsel, and we do not deem it necessary to pass upon it in order to dispose of the case."

In *State vs. Hines, Agent,* 228 S. W. Rep., 667, the Court of Civil Appeals of Texas held an action for penalties did not lie against the director general of railroads for failure to keep well lighted the water closets and adjacent depot grounds maintained at several passenger stations of a railroad taken over by the director general of railroads. The statutes of the State of Texas imposed a penalty for failure to keep these places lighted.

We respectfully submit that the question of humiliation being a component element of actual damages has not been approached by the courts in this country from the same angle as is here presented. It cannot be denied that, generally

speaking, awards for humiliation have been considered compensatory rather than punitive, but a careful analysis of the situation here presented must indubitably lead to the conclusion that an award for humiliation of the nature herewith contended is nothing more nor less than an award of punitive damages under a camouflage, and that such a verdict cannot stand against the sovereign power. In *Missouri Pacific R. Co. vs. Ault, supra,* we find the following:

> "The contention that the director general, being the carrier, is liable for the penalty imposed by the Arkansas Statute, is rested specifically upon the clause in section 10, to the effect that the carriers 'shall be 'subject to all laws and liabilities as common carriers, 'whether arising under State or Federal laws or at 'common law,' and the provision in section 15, that the 'lawful police regulations of the several States' shall continue unimpaired. By these provisions the United States submitted itself to the various laws, State and Federal, which prescribed how the duty of a common carrier by railroad should be performed, and what should be the remedy for failure to perform. By these laws the validity and extent of claims against the United States, arising out of the operation of the railroad, were to be determined. But there is nothing either in the purpose or the letter of these clauses to indicate that Congress intended to authorize suit against the Government for a penalty, if it should fail to perform the legal obligations imposed. The Government undertook, as carrier, to observe all existing laws; it undertook to compensate any person injured through a departure by its agents or servants from their duty under such law, but it did not undertake to punish itself for any departure by the imposition upon itself of fines and penalties, or to per-

mit any other sovereignty to punish it. Congress is not to be assumed to have adopted the methods of fines paid out of public funds to insure obedience to the law on the part of the Government's railway employees. The director general adopted a much more effective and direct method: 'Now that the railroads 'are in the possession and control of the Government, 'it would be futile to impose fines for violations of said 'laws and orders upon the Government, therefore it 'will become the duty of the director general in the 'enforcement of said laws and orders to impose pun-'ishment for wilful and inexcusable violations thereof 'upon the person or persons responsible therefor.' General Order No. 8, *id.*, p. 167.

"The purpose for which the Government permitted itself to be sued, was compensation, not punishment. In issuing General Order No. 50, the Director General was careful to confine the order to the limits set by the act, by concluding the first paragraph of the order: 'Provided, however, that this order shall not 'apply to actions, suits, or proceedings for the recovery 'of fines, penalties, and forfeitures.' Wherever the law permitted compensatory damages, they may be collected against the carrier while under Federal control. Such damages may reasonably include interest and costs. See *Hines vs. Taylor,* — Fla., —, 84 So., 381. But double damages, penalties, and forfeitures, which do not merely compensate but punish, are not within the purview of the statute. See *Hines vs. Taylor, supra; Jackson-Tweed Lumber Co. vs. Southern R. Co.,* 113 S. C., 236; 101 S. E., 924. The amount recovered in the present case over and above the wages due and unpaid, with interest, is in the nature of a punishment. It is called a penalty in the State statute. The Supreme Court of Arkansas had held that it was not technically a penalty, de-

claring: 'It is allowed for a double purpose—as a com-'pensation for the delay, and as a punishment for the 'failure to pay. It is composed of all the elements 'and serves all the purposes of exemplary damages.' *Leep vs. St. Louis, I. M. & S. R. Co.*, 58 Ark., 407, 440, 441; 23 L. R. A., 264; 41 Am. St. Rep., 109; 25 S. W., 75. But whether in a proceeding against the Director General it shall be deemed compensation or a penalty presents a question not of state, but of Federal law. *Whatever name be applied, the element of punishment clearly predominates, and Congress has not given its consent that suits of this character be brought against the United States.*" (Italics ours.)

An excellent statement of the principle herewith contended for is found in the case of *Arizona Copper Co. vs. Burciago* (Ariz.), 177 Pac., 29-33, where the Supreme Court of Arizona, in determining what was meant by compensatory damages under the Workmen's Compensation Act of that State, said:

"With equal clearness humiliation and mortification can only result from wrong to the person injured through the intended act of the defendant, and where humiliation and mortification furnish the ground for recovery, the right of recovery depends upon whether the defendant purposely and designedly committed the wrong, thereby intending to humiliate the plaintiff and outrage his feelings. The damages recoverable for such wrong are punitive in character and furnish no ground for recovery in this kind of action, for the reason that such character of damages does not amount to actual damages but to punitive damages."

This might well have been written of the case herein, where the judgment of the State court is punitive rather than compensatory in nature, and is clearly opposed to the intent of the Federal statute as construed by this court.

As persuasive authority directly in point here and in line with what this court has declared in the *Ault* case, we call attention to *Davis, Agent, vs. McMillan* (Ga.), 115 S. E., 494, decided 20th January, 1923, by the Supreme Court of Georgia. In passing on the judgment of the lower court, which overruled a demurrer to a complaint against James C. Davis, Agent, based on malicious prosecution, the court said:

> "As we construe the petition to which the demurrer was interposed, it is purely a suit which seeks to recover damages for an act based upon malice. Without the element of malice, the entire structure of the suit must collapse. All parts of the petition which sought to recover what was in terms called punitive damages were stricken, and although, under the ruling of the trial court and the court of appeals, the recovery was restricted to what was termed 'compensatory' damages, we think that the name 'compensatory,' as applied therein, does not change the basic fact that the recovery is sought for an act which can authorize only punitive damages. Any damages recovered under the petition as it stands would amount to a penalty for a malicious act, and for this neither the United States, nor its agent, the Director General of Railroads, can be held liable."

For the foregoing reasons it is respectfully submitted that the writ of certiorari should be granted.

THOS. W. DAVIS,
Wilmington, N. C.;
DOUGLAS McKAY,
Columbia, S. C.,
Attorneys for James C. Davis, Agent Appointed by the President under Section 206 of the Transportation Act of 1920.

NOTICE.

To Messrs. L. D. Jennings and M. M. Weinberg, Attorneys for Respondent:

You will please take notice that the foregoing petition for a writ of certiorari and brief in support thereof will be presented to the Supreme Court of the United States on Monday, 14th day of May, 1923, at twelve o'clock noon, or as soon thereafter as counsel can be heard.

THOS. W. DAVIS,
DOUGLAS McKAY,
Attorneys for the Petitioner, James C. Davis, Agent Appointed by the President under Section 206 of the Transportation Act of 1920.

Service of a copy of the above notice, petition, and brief is acknowledged, this 27th day of April, 1923.

L. D. JENNINGS,
Attorney for J. M. Currie, Respondent.

[Endorsed:] In the Supreme Court of the United States. October term, A. D. 1922. James C. Davis, Agent appointed by the President under Section 206 of the Transportation Act of 1920, Petitioner, *against* J. M. Currie, Respondent. Petition for writ of certiorari to the Supreme Court of South Carolina, and brief in support of petition. Law offices Douglas McKay, Liberty Bank Building, Columbia, S. C.

(9428)

Office Supreme Court, U. S.
FILED
MAR 25 1924
WM. R. STANSBURY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. [redacted]60

JAMES C. DAVIS, AGENT APPOINTED BY THE PRESIDENT UNDER THE TRANSPORTATION ACT OF 1920, PETITIONER,

versus

J. M. CURRIE, RESPONDENT.

ON CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA.

BRIEF OF JAMES C. DAVIS, AGENT APPOINTED BY THE PRESIDENT.

DOUGLAS McKAY,
THOS. W. DAVIS,
Attorneys for Petitioner.

(28,604)

INDEX.

	Page
Table of cases and authorities	1
Statement of facts	1
Assignment of error: The judgment against the Director General for wounded feelings and humiliation arising from a willful and malicious act of the servant is unauthorized, being punitive	4
Brief and argument	4
Conclusion	27

TABLE OF CASES AND AUTHORITIES.

Arizona Copper Company v. Burciago, 177 Pacific, 29-33 (Ariz.)	14
Bigby v. United States, 188 U. S., 400; 23 Sup. Ct., 468; 47 L. Ed., 519	20
Cotton v. Fisheries Products Co., 106 S. E., 487-488 (N. C.)	7
Davis, Director General, v. Green, 67 L. Ed., 139 (Adv. Op., January 1, 1923)	23
Davis, Agent, v. McMillan, 115 S. E., 494 (Ga.)	21
Davis, Agent, v. McMillan, 112 S. E., 913 (Ga.)	23
Davis, Director General, v. Wechsler, 68 L. Ed., 5 (Adv. Op., November 1, 1923)	26
Director General of Railroads v. Kastenbaum, 68 L. Ed., 84 (Adv. Op., December 1, 1923)	24, 25
Dougherty v. Director General of Railroads, 276 Fed., 451	22
Dougherty v. Payne, 291 Fed., 61	23
Gibbons v. United States, 8 Wall., 269; 19 L. Ed., 453	21
Ginn v. U. S. R. R. Administration, 103 S. E., 548 (S. C.)	7, 19
Hill v. United States, 149 U. S., 593; 13 Sup. Ct., 1011; 37 L. Ed., 862	21
Hines v. Gravins (Va.), 112 S. E., 869	10, 23
Hines, Director General, v. Gravins, 118 S. E., 114 (Va.)	10
Howard v. Davis, D. G., 95 So., 354 (Ala.)	18
Massey v. Hines (S. C.), 108 S. E., 181	7
Matthews v. Davis, Director General (S. C.), 117 S. E., 642	7, 19
Missouri Pacific Railroad Company v. Ault, 256 U. S., 554; 65 L. Ed., 1087	7, 8, 15, 17, 18, 21
Oliver v. Columbia N. & L. R. Co. (S. C.), 43 S. E., 420-421	6
Rowell v. Hines, D. G., 103 S. E., 545-546 (S. C.)	11, 19
Southern Railway Company v. Bush, 122 Ala., 470; 26 South., 168	18
State v. Hines, Agent, 228 S. W., 667 (Texas)	24
Wadsworth v. Western Union Telegraph Company, 8 S. W., 574-582 (Tenn.)	13
Watts v. Southbound R. Co., 38 S. E., at page 242	6

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 322.

JAMES C. DAVIS, AGENT APPOINTED BY THE PRESIDENT UNDER SECTION 206 OF THE TRANSPORTATION ACT OF 1920, PETITIONER,

against

J. M. CURRIE, RESPONDENT.

ON CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA.

BRIEF FOR PETITIONER.

Statement of Facts.

This is a proceeding to review, on writ of certiorari granted by this court, a judgment of the Supreme Court of South Carolina sustaining a judgment against the Director General of Railroads in the sum of $8,660 for humiliation, mental

anguish, and injury to feelings, alleged to have been suffered by a passenger, arising out of the willful, wanton and malicious acts of a train gatekeeper, and without any substantial physical injury or other element of recoverable damages being shown.

The facts, as they appear from respondent's testimony (R., pp. 4-5), are that on August 31, 1919, at Florence, South Carolina, respondent purchased a ticket entitling him to transportation as a passenger on a line of railroad, then in charge of the Director General of Railroads, from Florence to Mayesville, South Carolina, and then presented himself at the gate through which passengers usually passed in going to board trains; that the gate was in charge of a gatekeeper, an employee of the Director General, to whom respondent showed his ticket, whereupon the gatekeeper looked at his ticket, handed it back to respondent, and reached over and gave him a "shove," causing him to fall and bruise his arm in the presence of a crowd of people; that respondent shortly thereafter made four separate attempts to go through the gate to his train, and each time was threatened and cursed and told that he could not go through the gate; that after one of such rebuffs respondent went to the ticket agent and told the latter of his necessity of getting on the train to fulfill important business arrangements, and the ticket agent suggested that he try getting through another gate about 75 feet away, but which, as respondent claimed, was not for passengers to use; whereupon respondent said that he did not want to steal through, as he had bought his ticket; that when plaintiff went back to the gateman and told him what the ticket agent had said about trying the gatekeeper again, the gateman replied that he "didn't care what the ticket agent or Mr. Hare,

the superintendent (of the railroad) or anybody else said, he wouldn't let him through." There was other testimony, which was not disputed (R., p. 7, f. 11), that the other gate which the ticket agent suggested that respondent go through was used by a great many passengers going in and out.

Respondent brought this suit against the Director General of Railroads for damages because of the "willful, wanton, and malicious" violation of his rights by the gatekeeper, claiming damages in his complaint (R., p. 3, f. 4) for humiliation and wounded feelings, and also for business losses caused by the enforced delay, as alleged in the complaint. Timely objection was made in the trial court that the evidence as to business losses was incompetent, and that there could be no recovery for humiliation and injury to feelings, but the trial court overruled such objections and submitted the case to the jury, which rendered a verdict for respondent of $10,000. The Supreme Court of South Carolina, on appeal (R., pp. 22-24, ff. 34-36), sustained petitioner's exceptions as to the allowance of damages for business losses under the evidence, but (R., pp. 25-28) overruled his exceptions to the allowance of damages for wounded feelings and humiliation, which was the only other element of damage claimed, and reversed the judgment unless plaintiff should remit from the face of the judgment $1,340, which represented the alleged business losses, and file stipulation of remission in the Supreme Court within 10 days, and thereafter, within such period, respondent filed stipulation in the Supreme Court remitting the sum of $1,340 from the original judgment of $10,000, whereupon the judgment of the Supreme Court of South Carolina for respondent in the sum of $8,660 became final.

Assignment of Error.

The judgment against the Director General of Railroads for wounded feelings and humiliation arising out of a wanton, willful, and malicious act of his servant is unauthorized, involving, essentially, the infliction of a penalty upon the Government.

BRIEF AND ARGUMENT.

The judgment against the Director General of Railroads is unauthorized because it involves, substantially and essentially, the infliction of a severe penalty upon the Government, under the guise of compensatory damages, for humiliation and mental anguish, on account of the willful acts of its agent.

The Supreme Court of South Carolina determined (R., pp. 22 and 28) that the verdict of $10,000 was made up of $1,340 for actual business losses and damage and $8,660 for humiliation and injured feelings, and affirmed the judgment in the latter amount against the United States Government because of humiliation and wounded feelings caused by delicts of a servant of the Government, who, according to the complaint, acted "willfully, wantonly, and maliciously."

It is clear, we think, from the record that liability was asserted against the Government solely on account of the willful and malicious acts of its agents, and that the case was tried on that theory, and the Government in fact penalized by the infliction of a large judgment against it for alleged humiliation and mental anguish, whether the damages awarded be characterized as compensatory damages or as a

penalty. The gist of the allegations of negligence and damage sustained is contained in the ninth paragraph of the complaint (R., p. 3), reading:

> "That said defendants, by and through said R. L. Croswell, *willfully and wantonly and maliciously* prevented plaintiff from taking his train, cursed, assaulted and abused plaintiff, caused him great humiliation, the loss of two days' time, and damaged him by reason of his failure to take up said machinery on demurrage and by reason of having his laborers idle on account thereof, and that the acts of said defendants in so refusing to admit plaintiff to his train and in so cursing, assaulting, and abusing plaintiff, jointly and severally, caused and occasioned plaintiff damage in the sum of $50,000.00."

It will be noted that the only damage claimed, aside from loss of time and interference with business plans, which was not allowed by the State Supreme Court, was for humiliation. Not only was willfulness and maliciousness charged in the complaint, but it was in several places in the trial court's charge submitted to the jury, and while the jury were charged that they could not allow punitive damages, the question of the Government's alleged willful and malicious conduct was submitted to them in a number of places (R., pp. 10 and 11, ff. 16 and 17).

Further, as indicating that the spirit and atmosphere of the action and trial was one of punishment of the petitioner for the willful, wanton and malicious acts of his servant, we call attention to the language of a part of the order of the trial judge (R., p. 18, f. 27) refusing a new trial, reading:

> "This may appear to be rather a large actual compensation for the wrongs here complained of, *but, if the rights of the law abiding citizens were properly respected,* there would be less litigation on the civil side of the court, and fewer prosecutions on the criminal side,while the criticising public which now charges the law with failure would probably find the solution of many public ills in a better conception of the rights of the individual citizen *and through insistence that none shall invade those rights with impunity* or in contravention of the law which governs and protects all alike."

The italicized portions of the foregoing (italics ours) clearly indicate that the trial judge thought the very large verdict was justified as a punishment for not properly respecting the rights of citizens and as a deterrent against the invasion of such rights with impunity. This is the very essence of the doctrine of punitive damages as enunciated by the courts, including those of South Carolina.

In *Watts v. Southbound R. Co.,* 38 S. E., at page 242, the South Carolina Supreme Court said:

> "Exemplary or punitive damages go to the plaintiff, not as a fine or penalty for a public wrong, but in vindication of a private right which has been willfully invaded; and, indeed it may be said that such damages in a measure compensate or satisfy for the willfulness with which the private right was invaded, but, in addition thereto, operating as a deterring punishment to the wrongdoer, and as a warning to others."

Likewise in *Oliver v. Columbia, N. & L. R. Co.* (S. C.), 43 S. E., pages 420-421, the same language was repeated, and it was stated that such damages were sometimes spoken

of as "vindictive" and "exemplary" damages and were also sometimes referred to as "smart money" and "blood money."

The authorities in other jurisdictions are to the same effect:

> "Punitive damages, sometimes called smart money, are allowed in cases where the injury is inflicted in a malicious, wanton, and reckless manner. The defendant's conduct must have been actually malicious or wanton, displaying a spirit of mischief, towards the plaintiff, or of reckless and criminal indifference to his rights. When these elements are present, damages commensurate with the injury may be allowed by way of punishment to the defendants. But these damages are awarded on the grounds of public policy, for example's sake, and not because the plaintiff has a right to the money, but it goes to him merely because it is assessed in his suit. * * * Compensatory damages are based upon injuries suffered by the plaintiff, while punitive damages are awarded upon wrongs intended by the defendants."
>
> *Cotton v. Fisheries Products Co.*, 106 S. E., 487-488 (N. C.).

It is well established under the decisions of the courts that damages of a punitive nature cannot be awarded against the United States Government on account of the willful and malicious acts of its agents in the operation of railroads taken over under Federal control. *Missouri Pacific Railroad Company v. Ault*, 256 U. S., 554; 65 L. Ed., 1087; *Matthews v. Davis, Director General* (S. C.), 117 S. E., 642; *Ginn v. Hines* (S. C.), 103 S. E., 548; *Massey v. Hines* (S. C.), 108 S. E., 181. The act of Congress taking over the railroads and the order of the Director General of Railroads made there-

under, as construed by the decisions of this court, clearly show that damages in fact of a non-compensatory character cannot be awarded against the Director General on account of the willful acts of his agent, in whatever way they may be characterized by the local law. As stated by this court in *Missouri Pacific Railroad Company v. Ault, supra,* in discussing this question:

> "The Director General adopted a much more effective and direct method: 'Now that the railroads are in the possession and control of the government, it would be futile to impose fines for violations for said laws and orders upon the government, therefore it will become the duty of the Director General in the enforcement of said laws and orders *to impose punishments for willful and inexcusable violations* thereof upon the person or persons responsible therefor.' General Order No. 8, *id.*, p. 167."

Likewise, in General Order No. 50-A, the Director General of Railroads specified in what actions the Government could be sued in the operation of railroads and specifically excluded actions for the recovery of fines, penalties and forfeitures, which, as this court clearly indicated in the Ault case, embraces all recoveries or impositions where "the element of punishment clearly predominates." The pertinent part of General Order No. 50, as amended by No. 50-A, reads:

> "Whereas by the proclamations dated December 26, 1917, and April 11, 1918, the President took possession and assumed control of systems of transportation and the appurtenances thereof, and appointed the undersigned, William G. McAdoo, Director General of Railroads, and provided in and by said proclama-

tions that 'until and except so far as said director shall from time to time otherwise by general or special orders determine, such systems of transportation shall remain subject to all existing statutes and orders of the Interstate Commerce Commisson and to all statutes * * * but any orders, general or special, hereafter made by said director shall have paramount authority and be obeyed as such;" and

"Whereas the act of Congress, called the Federal Control Act, approved March 21, 1918, provided that 'carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this act or any other act applicable to such Federal control, or with any order of the President;"

"It is therefore ordered, that actions at law, suits in equity, and proceedings in admiralty hereafter brought in any court based on contract, binding upon the Director General of Railroads, claim for death or injury to person, or for loss and damage to property, arising since December 31, 1917, and growing out of the possession, use, control or operation of any railroad or system of transportation by the Director General of Railroads, which action, suit, or proceeding, but for Federal control might have been brought against the carrier company, shall be brought against the Director General of Railroads, and not otherwise; provided, however, that this order shall not apply to actions, suits, or proceedings for the recovery of *fines, penalties, and forfeitures.*"

While, as noted in the statement of facts, the complaint alleged that the gateman "shoved" plaintiff and he fell and

sustained a "minor" bruise, yet both the complainant and plaintiff's evidence show that he sustained no personal injury of any substance or moment and make it apparent that the allegation as to injury was made only for the purpose of hanging thereon a large recovery of alleged "compensatory" damages against the Government for mental anguish and humiliation, and the result of the trial in the State court shows that this expectation was eminently justified. The Supreme Court of South Carolina, therefore, properly assumed, as it did, that the recovery of $8,660, which it allowed to stand after eliminating the part of the verdict for actual damages for business losses, represented damages for mental anguish and wounded feelings, and in upholding the recovery against the Director General it held that damages for mental anguish might be recovered even in the absence of any substantial physical injury (R., p. 26, f. 39). While we concede that damages may ordinarily be awarded for mental anguish or wounded feelings when accompanied by substantial physical injury, and that such damages are ordinarily denominated compensatory rather than punitive, we submit that a careful analysis of the facts and record in this case leaves no room to doubt that the damages awarded against the Director General herein were clearly punitive in their nature and purpose.

A case involving somewhat similar questions was recently decided by the Supreme Court of Appeals of Virginia, *Hines, Director General, v. Gravins,* 118 S. E., 114 (Va.), decided June 14, 1923. It appears from a former decision in the case (112 S. E., 869) that the action was brought against the Director General to recover actual and punitive damages for scandalous words uttered by an agent of the Director General

within the scope of his authority. In the decision first rendered the Virginia court held that punitive damages could not be recovered against the Director General in such a case, citing, among other decisions, the decisions of this court in the *Ault* case and of the Supreme Court of South Carolina in *Rowell v. Hines, Director General,* 103 S. E., 546 (S. C.), holding that "the Director General could not be sued for willfulness." The Virginia court, in passing, said (112 S. E., page 873):

> "Punishment of the offender as a deterrent example to others is the sole justification for awards of punitive or exemplary damages, and *we are unable to perceive any distinction between penalties imposed pursuant to the common law and those imposed by statutory sanction.*"

The decision reported in 118 S. E., 114 (Va.), was on rehearing, and the first question considered was, "Does the statute authorizing an action for insulting words impose a liability upon a master for compensatory damages for insulting words uttered by his agent in the course of his employment when such words are neither authorized nor ratified by the employer?" and (2) "If so, is there any difference in this respect between the Director General of Railroads and any other employer?" The court held that, assuming a corporation would be liable under the circumstances stated, there was a difference in liability as to the Director General, and that the latter would not be liable. The following quotation from pages 115-116 of the opinion gives the reasoning of the court:

> "It seems manifest also that one of the objects of the order was to limit the causes of action upon which

the Government gave its consent to be sued to the classes of cases hereinbefore mentioned. No other reason can be assigned for the classification of the causes of action mentioned in the order. If it was not intended to impose a restriction, there was no necessity or propriety in making the classification, as the statutes otherwise covered the whole ground. The statute, however, while giving very comprehensive rights of action, expressly excepted cases that were inconsistent with 'any order of the President,' and the President deemed it wise to restrict the right to the classes of cases designated in general order No. 50*a*. The term 'claim for death or injury to person' shows plainly that the injury to person referred to was a physical injury to the person, and not an injury to the *feelings or reputation*. He withdrew all other causes of action from the operation of the act, and restricted the right to sue to the classes of cases mentioned.

"There were good reasons for the restriction. The government had assumed large pecuniary obligations, and, while it desired to put the public to as little inconvenience as possible in asserting demands of a substantial nature, it recognized the necessity of conserving the assets of the companies, and to this end cut off the right of recovery of fines, penalties, and forfeitures, *and for invisible injuries the existence of which could not be disproved, and for which the law provided no measure of compensation, such as mental anguish for a private insult.* * * *

"To meet these heavy obligations, it was necessary not only to have a conservative economic administration of the affairs of the railroad companies, but also to cut off litigation of the class of the case at bar, where no physical injury was inflicted, no damage done to property, no contract violated, and where

the scales of justice could not be so adjusted as to measure in dollars and cents the extent of the mental hurt inflicted.

"It is clear from the collocation of the words that mere mental anguish was not an 'injury to person' within the meaning of the general order."

The Virginia court held, and we think its reasoning is sound, that damages solely for mental anguish and wounded feelings caused by the willfull act of an agent of the Director General are not of the kind which the Federal Control Act permits to be recovered against the Government. The vague and unsubstantial character of such damages is commented upon by the Virginia court, and the same views with respect to such damages have been taken by the great majority of State courts and uniformly by the Federal courts.

Nowhere has the illusory and punitive character of such damages been pointed out better than by a late distinguished justice of this court, Mr. Justice Lurton,, while a member of the Supreme Court of Tennessee. In *Wadsworth v. Western Union Telegraph Company,* 8 S. W., 574-582 (Tenn.), Mr. Justice Lurton said:

> "The reason why an independent action for such damages cannot and ought not to be sustained, is found in the remoteness of such damages, and in the metaphysical character of such an injury considered apart from physical pain. Such injuries are generally more sentimental than substantial, depending largely upon physical and nervous condition. The suffering of one under precisely the same circumstances would be no test of the suffering of another. Vague and shadowy, there is no possible standard by which such an injury can be justly com-

> pensated, or even approximately measured. Easily simulated and impossible to disprove, it falls within all the objections to speculative damages, which are universally excluded because of their uncertain character. That damages so imaginary, so metaphysical, so sentimental, shall be ascertained and assessed by a jury, with justness, *not by way of punishment to the defendant, but as mere compensation to the plaintiff, is not to be expected.*" (Italics ours.)

Another excellent statement of the same principle is found in the case of *Arizona Copper Company v. Burciago,* 177 Pacific, 29-33 (Ariz.), where the Supreme Court of Arizona, in determining what was meant by "compensatory damages" under the Workmen's Compensation Act of that State, said:

> "With equal clearness humiliation and mortification can only result from wrong to the person injured through the intended act of the defendant, and where humiliation and mortification furnish grounds for recovery, the right of recovery depends upon whether the defendant purposely and designedly committed the wrong, thereby intending to humiliate the plaintiff and outrage his feelings.
>
> "The damages recoverable for such wrong are punitive in character and furnish no ground for recovery in this kind of action, for the reason that such character of damages does not amount to actual damages, but to punitive damages."

The amount of the judgment against the Government in the present case well illustrates the wisdom of the opinion of Mr. Justice Lurton in the *Wadsworth* case, *supra,* and, irrespective of the other facts in the case pointing to the

same conclusion, of itself demonstrates that the damages awarded were substantially punitive in character. While petitioner concedes that this court will not review a question involving merely the excessiveness of damages awarded even against the Director General, this court should and will consider the amount of damages awarded as alleged compensatory damages in determining whether the judgment is in fact one for compensation or essentially a judgment inflicting punishment on the Government in the name and under the guise of compensation. This court will determine for itself in such cases whether the award shall be deemed compensation or a penalty. This was specifically held in the leading case of *Missouri Pacific R. Co. v. Ault, supra,* where this court said:

> "The contention that the director general, being the carrier, is liable for the penalty imposed by the Arkansas Statute, is rested specifically upon the clause in section 10, to the effect that the carriers 'shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law,' and the provision in section 15, that the 'lawful police regulations of the several States' shall continue unimpaired. By these provisions the United States submitted itself to the various laws, State and Federal, which prescribed how the duty of a common carrier by railroad should be performed, and what should be the remedy for failure to perform. By these laws the validity and extent of claims against the United States, arising out of the operation of the railroad, were to be determined. But there is nothing either in the purpose or the letter of these clauses to indicate that Congress intended to authorize suit against the Government for a penalty, if it should fail

to perform the legal obligations imposed. The Government undertook, as carrier, to observe all existing laws; it undertook to compensate any person injured through a departure by its agents or servants from their duty under such law, but it did not undertake to punish itself for any departure by the imposition upon itself of fines and penalties, or to permit any other sovereignty to punish it. Congress is not to be assumed to have adopted the methods of fines paid out of public funds to insure obedience to the law on the part of the Government's railway employees. The director general adopted a much more effective and direct method: 'Now that the railroads are in possession and control of the Government, it would be futile to impose fines for violations of said laws and orders upon the Government, therefore it will become the duty of the director general in the enforcement of said laws and orders to impose punishment for *willful and inexcusable violations* thereof upon the person or persons responsible therefor.' General Order No. 8, *id.*, p. 167.

"The purpose for which the Government permitted itself to be sued, was *compensation, not punishment.* In issuing General Order No. 50, the Director General was careful to confine the order to the limits set by the act, by concluding the first paragraph of the order: 'Provided, however, that this order shall not apply to actions, suits, or proceedings for the recovery of fines, penalties, and forfeitures.' Wherever the law permitted compensatory damages, they may be collected against the carrier while under Federal control. Such damages may reasonably include interest and costs. See *Hinds vs. Taylor,* — Fla., —; 84 So., 381. But double damages, penalties, and forfeitures, which do not merely compensate but punish, are not within the purview of the statute. See *Hines*

vs. Taylor, supra; Jackson-Tweed Lumber Co. vs. Southern R. Co., 113 S. C., 236; 101 S. E., 924. The amount recovered in the present case over and above the wages due and unpaid, with interest, is in the nature of a punishment. It is called a penalty in the State statute. The Supreme Court of Arkansas had held that it was not technically a penalty, declaring: 'It is allowed for a double purpose—as a compensation for the delay, and as a punishment for the failure to pay. It is composed of all the elements and serves all the purposes of exemplary damages.' *Leep vs. St. Louis, I. M. and S. R. Co.*, 58 Ark., 407, 440, 441; 23 L. R. A., 264; 41 Am. St. Rep., 109; 25 S. W., 75. But whether in a proceeding against the Director General it shall be deemed compensation or a penalty presents a question not of State, but of Federal law. *Whatever name be applied, the element of punishment clearly predominates, and Congress has not given its consent that suits of this character be brought against the United States.*"

We submit that the present case falls directly within the controlling principles of the *Ault* case. The fact that damages awarded against a railroad company or other defendant in personal-injury actions for mental anguish and humiliation are generally called compensatory damages in a technical sense cannot be given controlling effect to uphold a judgment against the Government where every circumstance points to the conclusion that it is punitive. Here the complaint alleged willfulness, the proof showed it, the trial judge in his order refusing a new trial indicated that he considered the verdict of a punitive character, and the amount of the verdict ($8,660) representing recovery for mental anguish

alone all demonstrate that punishment, and not compensation, is the essence of the judgment.

The courts of other jurisdictions have applied the principles laid down by this court in the *Ault* case, and have recognized that, irrespective of whether a judgment or statute technically involved a penalty, the Government could not be held liable if the element of punishment clearly predominated.

In the case of *Howard v. Davis, D. G.*, 95 So., 354 (Ala.), the Supreme Court of Alabama held:

> "It is true that in the case of *Sou. Ry. Co. v. Bush*, 122 Ala. 470, 26 South. 168, this court held that the homicide statute was not such a penal one, strictly speaking, as to excuse answering interrogatories under the constitutional provision there invoked, but it did not hold that the damages recoverable were not punitive as distinguished from compensatory, just as the Arkansas court held that the statute involved in the *Mo. Pac. R. R. Case, supra*, 'technically' did not prescribe a penalty, yet the Supreme Court of the United States held that, whatever name may be applied to it by the state court, it presented the question of federal, and not of state, law, and that the element of punishment clearly predominated, while the damages provided by our statute, as construed by many decisions of this court, are entirely punitive. As suggested by counsel for the appellant, this result renders our homicide statute abortive and inoperative as to deaths caused by the operation of railroads while under federal control; but we must bow to the highest authority in deciding federal questions, and 'Render, therefore, unto Cæsar the things which are Cæser's.'"

This was said of an action against the Director General under the homicide statute of Alabama, which had theretofore been construed as not to be a penal statute in some respects.

In *Rowell v. Hines*, 103 S. E., 545 (S. C.), the South Carolina Supreme Court itself held that "the Director General could not be sued for willfulness," and also in *Ginn v. U. S. R. R. Administration*, 103 S. E., 548 (S. C.), held that the Director General, representing the Government, cannot be held to respond in punitive damages. This was said in an action by a passenger.

As petitioner has pointed out, the complaint alleges that the acts of petitioner's gateman complained of, which were made the basis of this suit, were both willful and malicious, and respondent's testimony at trial, which was presumably accepted by the jury, clearly sustained this charge and leaves no doubt that the gateman in assaulting, cursing and abusing the petitioner acted willfully and without any apparent purpose of discharging his duties to the Government. Under such circumstances, the South Carolina Supreme Court has in the very late case of *Matthews v. Davis, Director General*, 117 S. E., 642 (S. C.), decided May 16, 1923, that the Government cannot be held responsible.

The action was against the Director General on account of a "willful assault and battery, alleged to have been committed by one M. A. Bell, alleged in the complaint to have been at the time of the assault and battery an agent of the Director General of Railroads." While the facts of the case are not given in the opinion of the Supreme Court, it appears from the record (case and exceptions) in the South Carolina Supreme Court in that case that the employee of the Director

General who made the alleged willful assault was the telegraph operator on duty at the passenger station, and that the plaintiff, Matthews, at the time of the alleged assault had come to the depot with his wife's mother, who was to take the train, so that the plaintiff occupied the position and was entitled to the protection of a passenger. The complaint alleged that plaintiff asked the operator when the train would arrive and received an impertinent answer, and that the operator then berated the plaintiff with opprobrious epithets, and without any provocation or just cause then and there committed a vigorous, willful, wanton and malicious assault upon plaintiff and struck, cut and bruised him with a knife, etc. Plaintiff's testimony fully sustained the above allegation, but there was testimony for the Director General to the effect that plaintiff himself began the trouble and provoked the assault. The South Carolina Supreme Court held that there could be no recovery. It said:

> "A careful examination of the evidence convinces us that there was no element of negligence in the case; whether the assault and battery was unprovoked, or whether Bell was defending himself, makes no difference. *The Government is not responsible for a willful assault and battery by a party in its service, in the absence of any statute by Congress making it liable and allowing the Government to be sued,* and we know of no such authority authorizing suit by plaintiff, in this case or any one similarly situated. The Government cannot be sued and made liable without its consent, given in some act of Congress, for torts, misconduct, misfeasance, or laches of its officers or employees. *Bigby v. United States,* 188 U. S., 400; 23 Sup. Ct., 468; 47 L. Ed., 519; *Hill v. United*

States, 149 U. S., 593; 13 Sup. Ct., 1011; 37 L. Ed., 862; *Gibbons v. United States,* 8 Wall., 269; 19 L. Ed., 453.

"No specific authority conferred by Congress has been cited to allow the plaintiff to recover in the case before us, for we think it is an attempt to recover on account of a willful tort committed by an alleged agent and employee of the Government.

"*Missouri Pacific R. Co. v. Ault,* 256 U. S., 554; 41 Sup. Ct., 593; 65 L. Ed., 1087, decides that actions against the Director General of Railroads can be such only as are authorized by acts of Congress."

The petitioner submits that the decision of the South Carolina Supreme Court in the *Matthews* case, *supra,* which was rendered *after* the decision in the case under review herein, is correct, although it appears to clearly conflict with its decision in the present case. As above noted, it is both alleged and proved herein that the acts of petitioner's gateman, while committed in the line of his duties, were willful and wanton, and done without any excuse, either offered or apparent. We think, therefore, that the later decision of the Supreme Court of South Carolina in the *Matthews* case affords ample authority for the reversal of the judgment in the present case. It is noticeable that the justice who rendered the opinion and judgment in the present case (Marion, A. J.) dissents in the *Matthews* case.

As persuasive authority in line with the cases herein discussed, including, we think, the *Ault* case, we call attention to the case of *Davis, agent, v. McMillan,* 115 S. E., 494 (Ga.), decided January 20, 1923, by the Supreme

Court of Georgia. This was an action against the Director General of Railroads for a malicious prosecution, claiming punitive and compensatory damages. The court considered the question of whether damages for a malicious prosecution, though alleged to be "compensatory," were chargeable against the United States or its agent. It held:

> "As we construe the petition to which the demurrer was interposed, it is purely a suit which seeks to recover damages for an act based upon malice. Without the element of malice, the entire structure of the suit must collapse. All parts of the petition which sought to recover what was in terms called punitive damages were stricken; and although, under the ruling of the trial court and the Court of Appeals, the recovery was restricted to what was termed 'compensatory' damages, we think that the name 'compensatory,' as applied therein, does not change the basic fact that the recovery is sought for an act which can authorize only punitive damages. Any damages recovered under the petition as it stands would amount to a penalty for a malicious act; and for this neither the United States, nor its agent, the Director General of Railroads, can be held liable."

It may be here noted that the authorities are not uniform as to whether an action for malicious prosecution may be maintained against the Director General. In the case of *Dougherty v. Payne, Director General of Railroads*, 276 Fed., 451, the District Court for the Southern District of Florida held, without extended discussion, that such an action obviously could not be maintained. This decision was reversed by the Circuit Court of Appeals, 5th Circuit, in *Dougherty v.*

Payne, 291 Fed., 61. While it may be that the decision of the Circuit Court of Appeals is contrary to the principles laid down by this court in its recent decision in the *Kastenbaum* case, hereinafter mentioned, it is sufficient for present purposes to say that the decision in the *Dougherty* case does not militate against the position of petitioner herein; for the Circuit Court of Appeals was careful to point out that the prosecution complained of therein "was resorted to as one of the methods of protecting such property, and clearly related to the operation of the Pullman Company's business as a carrier, as distinguished from a corporate act wholly foreign to such operation." The willful cursing, assaulting and abusing of a passenger by a train gateman certainly is not one of the usual methods of discharging his duties to the public or in any sense adapted to that end. Likewise the court pointed out that compensatory damages only were recoverable and cited as controlling authorities the *Ault* case, the case of *Hines v. Gravins* (*Va.*), 112 S. E., 869, discussed herein, and *Davis v. McMillan* (*Ga.*), 112 S. E., 913. The *Georgia* case was later reversed by the Supreme Court of Georgia, and the *Virginia* case and its companion decision, reported in 118 S. E., 114, *supra,* clearly indicate that neither punitive damages nor damages for humiliation and mental anguish in the guise of compensatory damages can be recovered against the Director General.

See, also, in connection with the general question of responsibility for willful and malicious acts of an employee, the recent decision of this court in *Davis, Director Genearl, v. Green,* 67 L. Ed., 139 (Adv. Op., Jan. 1, 1923). Here this court held that the Director General was not liable for a willful act of his employee (homicide) done wholly out-

side the scope of his employment, but while his employment was going on, irrespective of whatever might be the local law of Mississippi, on the question. The gatekeeper's conduct in the present case was undoubtedly willful. When plaintiff told the gateman, Crosswell, what the ticket agent said about plaintiff going through, the gateman replied that "he didn't care what the ticket agent or Mr. Hare, the superintendent, or anyone else said, he would not let him through; he was running that gate."

In the case of *State v. Hines, agent,* 228 S. W., 667 (Texas), the Texas Court of Civil Appeals held that an action for penalties did not lie against the Director General of Railroads for failure to keep well lighted the closets and adjacent depot grounds maintained at passenger stations under State statute imposing a penalty for failure to keep such places lighted. The court said that the statute was penal in its nature and not enforceable against the Government.

There is nothing, we submit, in the recent decision of this court in *Director General of Railroads v. Kastenbaum,* 68 L. Ed., 84 (Adv. Op., Dec. 1, 1923), decided November 12, 1923, which is contrary to our position herein. This was a suit brought against the Director General for damages for false imprisonment and malicious prosecution. The trial court dismissed the cause of action for malicious prosecution, but entertained the action for false imprisonment, and judgment for plaintiff for $500 therein was rendered against the Director General. This court, after citing General Order No. 50 and the *Ault* case, upheld such judgment as limited to the recovery of "compensatory damages," and in the course of its opinion said:

> "The action for false imprisonment is in the nature of a trespass for a wrong or illegal act in which the defendant must have personally participated, directly or by indirect procurement. The gist of it is an unlawful detention and, that being shown, the burden is on the defendant to establish probable cause for the arrest. The want of probable cause, certainly in the absence of proof of guilt or conviction of the plaintiff, *is measured by the state of the defendant's knowledge, not by his intent.* It means the absence of probable cause known to the defendant when he instituted the suit. *But the standard applied to defendant's consciousness is external to it.* The question is not whether he thought the facts to constitute probable cause, but whether the court thinks they did."

The court added:

> "But as we have seen, good faith is not enough to constitute probable cause. That faith must be grounded on facts within knowledge of the Director General's agent, which in the judgment of the court would make his faith reasonable."

It will be observed that this court was careful to point out that the want of probable cause, which has the effect of making the unlawful imprisonment actionable, is not a matter of defendant's "intent," but is a matter of his "knowledge," and that the standard of responsibility to be applied is external to defendant. In other words, a defendant may become liable in an action for false imprisonment with the best of intentions or irrespective of his intent. The *Kastenbaum* case, therefore, is clearly distinguishable from the present case, where the assault and abuse of petitioner's agent is alleged to be, and necessarily is, willful; rather the *Kastenbaum* case, by its reasoning, sustains our contention

herein, in that it clearly implies that the decision might be otherwise in a suit involving a willful and intentional wrong done by the agent of the Government where the question of intent is of the essence of the action.

Furthermore, in the present case the record shows that the judgment was essentially and substantially of a punitive character and cannot reasonably be given any other construction, while in the *Kastenbaum* case, not only was the recovery limited to compensatory damages by the instructions of the court, but there was nothing in the facts surrounding the trial or in the amount recovered to indicate that the element of punishment predominated.

As petitioner has heretofore pointed out, this court has held in the *Ault* case, *supra,* that whether a recovery be deemed compensation or a penalty presents a question of Federal and not State law, and that a judgment against the Director General will be set aside if the element of punishment clearly predominates, whatever name be applied to the recovery. This principle is general and necessary, as well in matters of substantive law as in matters of local practice. *Davis, Director General, v. Wechsler,* 68 L. Ed., 5 (Adv. Op., Nov. 1, 1923). The pleadings, the evidence in the case, the trial judge's order denying a new trial, and particularly the exceedingly large amount of recovery compared with the slight actual injury, all clearly point to the fact that the judgment against the Government herein was essentially of a punitive character, and the mere fact that it is denominated compensatory by the State courts cannot alter that fact. If such a judgment in such an amount can be sustained against the Director General, then the rule that the Government cannot be punished because of the willful acts of its agent, enunciated by the act of Congress, the orders of the Director Gen-

eral, and the decisions of this and other courts becomes a mere hollow formula, which can and will be readily circumvented by verdicts and judgments such as that here involved, which inflict enormous punitive damages upon the Government under the guise and technical classification of compensation. If the judgment against the Director General herein of $8,660 for humiliation can be sustained as being substantially compensatory in character, which it must be in order to sustain the judgment, there is no reason why a judgment for $18,000 or for any sum which should strike the fancy of the jury should not be sustained on the same theory.

Conclusion.

The petitioner submits that the judgment under review is clearly unauthorized and unlawful as against the Director General of Railroads, first, because the element of punishment clearly predominates in the judgment and it in effect imposes large punitive damages upon the Government and damages of an uncertain, speculative and metaphysical character; and, second, because it imposes a liability on the Government for the willful and malicious acts of its agent done in the course of his employment, but without any apparent relation thereto.

Respectfully submitted,

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WILMINGTON, N. C., *March* 19, 1924.

Filed
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WM. R. STANSBURY
Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. [redacted]30

JAMES C. DAVIS, Agent Appointed by the President under the Reconstruction Acts of 1920, Complainant,

vs.

J. M. CURRIE.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

BRIEF OF RESPONDENT.

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TABLE OF CONTENTS.

	Page
Preliminary statement	1
Statement of fact	2
Statement of issues	3
Points and authorities	4
Argument	6
I. The judgment is for compensatory damages solely	6
1. Concurrent findings of fact not disturbed	6
2. This court will not consider whether verdict excessive	7
3. No attempt to disguise nature and grounds of recovery	8
4. Proper instructions were given to and followed by jury	10
II. Damages for humiliation, etc., are actual damages recoverable against the Government	14
1. Compensatory damages are recoverable against Government	14
2. Compensation for humiliation, etc., is a proper element of actual damages	15
III. Reply to petitioner's points	18
1. Liability for willful conduct of agent	18
2. Mathews v. Davis inapplicable	20
3. Hines v. Gravins distinguished	21
4. Davis v. Green distinguished	23

TABLE OF CASES CITED.

Adams v. Ry. Co., 103 S. C., 327; 87 S. E., 1007	6, 15
Calhoun v. Sou. Ry. Co., 115 S. C., 489; 106 S. E., 780	5, 9
Cave v. Ry. Co., 94 S. C., 282; 77 S. E., 1017	5, 15
Davis v. Green, 260 U. S., 349; 67 L. Ed., 299	23
Director General v. Kastenbaum, 68 L. Ed., 84; Adv. Op., 1924, No. 3	6, 17
Ginn v. Hines, 114 S. C., 236; 103 S. E., 548	5, 9
Hines v. Gravins, 118 S. E., 114	21
Jackson-Tweed Lbr. Co. v. Sou. Ry., 113 S. C., 236; 101 S. E., 924	5, 9

Page

Lake Shore R. Co. v. Prentice, 147 U. S., 101; 37 L. Ed., 97.... 6, 15
Lipman v. A. C. L. R. R., 108 S. C., 151; 93 S. E., 714..... 5, 15
Massey v. Hines, 117 S. C., 1; 108 S. E., 181..... 5, 9
Mathews v. Davis, 117 S. E., 642..... 20, 21
Missouri Pac. R. Co. v. Ault, 256 U. S., 554; 65 L. Ed., 1087. 4, 5, 9, 14
New Jersey, etc., Co. v. Brackett, 212 U. S., 637; 30 L. Ed., 1029 24
Scott v. Seymour, 105 S. C., 43..... 20
Seymour v. Director General, 290 Fed., 291..... 23
Smith v. Whitemire, 110 S. E., 80..... 20
Sou. Ry.-Carolina Division v. Bennett, 233 U. S., 80; 58 L. Ed., 860 ..... 4, 7
Tolbert v. Fonché, 110 S. E., 115..... 20

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 322.

JAMES C. DAVIS, AGENT APPOINTED BY THE PRESIDENT UNDER THE TRANSPORTATION ACT OF 1920, PETITIONER,

vs.

J. M. CURRIE.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

BRIEF OF RESPONDENT.

Preliminary Statement.

This action for damages was commenced on September 19, 1919, and was tried in the Court of Common Pleas for Sumter County, S. C., on November 23, 1921. The trial resulted in a verdict and judgment in favor of respondent for $10,000.00, from which petitioner appealed to the Supreme Court of South Carolina, wherein on February 26, 1923,

judgment was rendered in effect affirming the judgment below except as to the sum of $1,340.00, which respondent remitted.

The case comes before this Court on return to a writ of certiorari duly issued.

Statement of Fact.

On August 31, 1919, at Florence, S. C., the plaintiff purchased a ticket entitling him to transportation as a passenger on a line of railroad then in charge of the Director General of Railroads of the United States Government from Florence, S. C., to Mayesville, S. C. He then presented himself at the gate through which passengers were required or invited to pass in order to board trains. The gate was in charge of a gatekeeper, a railroad employee, to whom the plaintiff showed his ticket. The gatekeeper refused him passage through the gateway and then "shoved" him back, causing him to fall and bruise his arm, in the presence of a "crowd of people." Thereafter the plaintiff made four attempts, at separate times, to get through the gate to his train. Each time he was threatened with physical violence and cursed by the gatekeeper. He then went to the ticket agent, told him of important business plans and arrangements that made it necessary for him to get to Mayesville on the train for which he had bought his ticket. The ticket agent suggested that he try getting through another gate about seventy-five feet away, but which, as plaintiff claimed, "was not for passengers to go through." He told the ticket agent he didn't care to steal through, as he had bought his ticket. He then met Captain Johnson, a conductor for the line of railroad upon which he had taken passage, who, upon being apprised

of the situation, advised him to try the gateman again. He then went back to the gate, again showed the gateman his ticket, and was again repulsed with rude, threatening and insulting language. After that he made one or two more attempts to get through the gate, with the same result. The remarkable story, outlined by the foregoing statement, is the more remarkable in that it is corroborated rather than discredited in essential particulars by the testimony of Conductor Johnson and the ticket agent, defendant's witnesses at the trial (Trans., pp. 21, 22). Respondent's damage was assessed by the jury at $10,000.00. The judgment of the Supreme Court eliminated $1,340.00, claimed as certain business losses, leaving the recovery $8,660.00.

In making the award, the jury were permitted to consider respondent's humiliation and mental suffering as a basis for actual damages.

Statement of Issues.

The sole question now before the Court is stated by petitioner on page 5 of the petition as follows:

> "The sole question presented for review by this court is, Can damages for humiliation and wounded feelings be awarded the respondent against the petitioner, the United States Railroad Administration, under the provisions of the Federal Control Act, the proclamations of the President and the general orders of the director general pursuant thereto?"

However, in the brief accompanying this petition, petitioner asserts that an award for humiliation under the circumstances disclosed by the record is nothing more nor less than an award of punitive damages under a camouflage.

We, therefore, argue two propositions:

ISSUE I.

The judgment below is for compensatory damages solely.

ISSUE II.

Damages for humiliation and mental suffering are actual damages, recoverable against the Director General of Railroads.

Points and Authorities.

ISSUE I.

THE JUDGMENT BELOW IS FOR COMPENSATORY DAMAGES SOLELY.

Point I.

Concurrent findings of fact by courts below will not be disturbed unless error is palpable.

Point II.

This court will not consider whether verdict excessive.

Southern Railway, Carolina Division, *vs.* Bennett, 233 U. S. 80, 58 L. Ed. 860.

Point III.

There was no attempt to disguise the recovery or evade the rules of Federal liability.

Mo. Pacific Railway Co. *vs.* Ault, 256 U. S. 554, 65 L. Ed. 1087.

Jackson-Tweed Lumber Co. *vs.* Southern Railway Co., 113 S. C. 236, 101 S. E. 924.

Calhoun *vs.* Southern Railway Co., 115 S. C. 489, 106 S. E. 780.

Massey *vs.* Hines, 117 S. C. 1, 108 S. E. 181.

Ginn *vs.* Hines, 114 S. C. 236, 103 S. E. 548.

Point IV.

Proper instructions were given the jury and both courts below find these instructions were followed.

ISSUE II.

DAMAGES FOR HUMILIATION AND MENTAL SUFFERING ARE ACTUAL DAMAGES RECOVERABLE AGAINST THE DIRECTOR GENERAL OF RAILROADS.

Point I.

Compensatory damages are recoverable against the Director General.

Mo. Pacific Railway Co. *vs.* Ault, 256 U. S. 554, 65 L. Ed. 1087.

Point II.

Compensation for humiliation and mental suffering is a proper element of actual damage.

Lipman *vs.* A. C. L. R. R. Company, 108 S. C. 151, 93 S. E. 714.

Cave *vs.* Railway Company, 94 S. C. 282, 77 S. E. 1017.

Adams *vs.* Railway Company, 103 S. E. 327, 87 S. E. 1007.

Lake Shore Railroad Co. *vs.* Prentice, 147 U. S. 101, 37 L. Ed. 97.

Director General *vs.* Kastenbaum, 68 L. Ed. 84, Adv. Op. 1924, No. 3.

ARGUMENT.

Issue I.

The Judgment is for Compensatory Damage Solely.

Point 1.

Concurrent Findings of Fact by Courts Below Will Not Be Disturbed Unless Error Is Palpable.

The question is: Does the record disclose that the jury intended to penalize the defendant? Since the State courts, both trial and appellate, have held that the jury did not, before the petitioner can succeed he must show something more than a mere basis for difference of opinion. He must convince this Court that the record admits of no other reasonable inference than that a penalty was inflicted. And, since on this question of fact, both courts below concurred, petitioner must go further and show that the error of which he complains is palpable.

Point 2.

This Court Will Not Consider Whether Verdict Excessive.

Petitioner admits that the jury was justified in finding that the respondent, without provocation on his part, was assaulted, bruised, and publicly cursed, in violation of the contract between carrier and passenger. The jury so found. Obviously, respondent was entitled to something by way of damages for this violation of the contract, and this outrageous infringement of his personal rights. It was the right of respondent to have a jury, and not petitioner, fix the amount. Up to this point, petitioner makes no complaint. But when the amount is fixed, he asserts that it represents a punishment to him, not compensation to respondent. Beside the fact that the amount is larger than petitioner would have voluntarily paid, petitioner puts forth no ground for his assertion. Does not his allegation, then, amount merely to the assertion that the damages are excessive? But with that question, unless the jury were given erroneous instructions as to the measure of damages, this Court will not concern itself. In Southern Railway, Carolina Division, *vs.* Bennett, 233 U. S. 80, 58 L. Ed. 860, it was said:

> "The supposed error most insisted upon is the entering of judgment upon a verdict said to be manifestly excessive. It is admitted that the judge charged the jury correctly, according to principles established by Michigan C. R. Co. *v.* Vreeland, 227 U. S. 59, 57 L. Ed. 417, 33 Sup. Ct. Rep. 192, but it is thought to be apparent as matter of law that the jury found more than the charge or the law allowed. The argument is this: The deceased was making not more

than $900.00 a year, and the only visible ground of increase was the possibility that he might be promoted from fireman to engineer, with what pay was not shown. He could not have given more than $700.00 a year to his family. His expectation of life was about thirty years by the tables of mortality. Therefore at the legal rate of interest the income from $10,000 for thirty years was all that the plaintiff was entitled to, whereas she was given the principal of $20,000.00 out and out. It may be admitted that if it were true that the excess appeared as matter of law—that if, for instance, the statute fixed a maximum and the verdict exceeded it—a question might arise for this court. But a case of mere excess upon the evidence is a matter to be dealt with by the trial court. It does not present a question for re-examination here upon a writ of error. Lincoln *v.* Power, 151 U. S. 436, 38 L. Ed. 224, 14 Sup. Ct. Rep. 387; Herencia *v.* Guzman, 219 U. S. 44, 45, 55 L. Ed. 81, 82, 31 Sup. Ct. Rep. 135. The premises of the argument for the plaintiff in error were not conclusive upon the jury, and although the verdict may seem to us too large, no such error appears as to warrant our imputing to judge and jury a connivance in escaping the limits of the law."

Point 3.

There Was no Attempt to Disguise the Recovery or Evade the Rules of Federal Liability.

If by petitioner's assertion that the judgment is an award of punitive damages "under a camouflage" he means to imply that the State courts have attempted to disguise or hide the true nature of their holdings, so as to avoid the rule an-

nounced in Missouri Pacific R. Co. *vs.* Ault, 256 U. S. 554, 65 L. Ed. 1087, we deny the implication. It has no basis in the record or in fact. It imputes to the Supreme Court of South Carolina an intent to deceive and commit a fraud upon the Government of the United States and upon the law. Such an imputation is inconsistent with the honor of the court and the high prefessional character of the counsel whose names appear upon petitioner's brief. We, therefore, assume that no such implication was or is intended.

Indeed, both before and after the decision in Missouri Pacific R. Co. *vs.* Ault, *supra,* the Supreme Court of South Carolina held that neither penalties nor punitive damages could be recovered against the United States, whether the Director General or the carrier was the nominal party to the suit.

Jackson-Tweed Lumber Co. *vs.* Southern Ry. Co., 113 S. C. 236, 101 S. E. 924.

Calhoun *vs.* Southern Ry. Co., 115 S. C. 489, 106 S. E. 780.

Massey *vs.* Hines, 117 S. C. 1, 108 S. E. 181.

Ginn *vs.* Hines, 114 S. C. 236, 103 S. E. 548

Incidentally Jackson-Tweed Lumber Co. *vs.* Southern Ry., *supra,* is cited in the opinion in Missouri Pac. R. Co. *vs.* Ault, *supra,* and, together with Calhoun *vs.* Southern Ry. Co., *supra,* was tried in the Court of Common Pleas for Sumter County, the same court before which the instant case was tried.

The courts of South Carolina were among the first in the United States to correctly interpret the liability of the Government under the Federal Control Act and to limit that

liability to awarding actual compensation to those damaged by delict of the Director General or his agents in performing the functions of a carrier. We see nothing in the instant case to indicate a departure from the views thus early announced and steadfastly maintained.

Point 4.

Proper Instructions Were Given the Jury and Both Courts Below Find These Instructions Were Followed.

Turning to the record in the case at bar, we are struck with the care with which the jury were cautioned not to include punitive damages in their verdict.

It is stated at the outset that the action is against the United States, and that by it plaintiff seeks to recover actual damages, and differentiated from punitive damages (Trans., p. 9). Later on the Court correctly defines the terms negligence and willfulness, punitive damages and actual damages. Then:

> "Punitive damage is not an element in this case. It is my duty to charge you that you cannot award punitive damages here to the plaintiff, for the reason that punitive damages are not competent here as against the Government. So you confine yourselves to the evidence in this case with the view of determining whether or not the plaintiff is entitled to recover what I have explained to you as actual damages" (Trans., p. 10).

In commenting upon a request to charge that—

> "The fact that an injury was occasioned by willful and not negligent acts of the servants of a carrier

does not excuse the carrier for a failure to carry out its duty to a passenger,"

the Court goes on to repeat:

> "That is correct, and right there I tell you as I already have told you that the plaintiff is seeking to recover only actual damages, and *that is the only damages you can award him,* if you award him damages. Actual damages may flow out of a negligent act or a willful act. The plaintiff seeks to recover in this action only actual damages. So, gentlemen, *disabuse your minds of any doubt that may be raised there that it is within your province to award punitive damages, because you could not award anything but actual, tangible, measurable damages* growing out of this case * * *" (Trans., p. 13).

And, again, the Court charged petitioner's first request, with the comment shown below:

> "I charge you that this being an action against the Director General or Agent of the United States Government then operating the Atlantic Coast Line Railroad Company, you cannot find any punitive damages against the United States Government.
>
> "That is correct. I have already told you so. Any verdict you may render, involving punitive damages would be incompetent, because it is not consistent with this Court. As I said, and I reiterate, that the measure of damages that you can award in this case, if you award any to the plaintiff, is actual damages" (Trans., p. 14).

In the light of findings to the contrary by both the trial judge and the appellate court it cannot be assumed that the jury disregarded these forcible and explicit instructions.

The trial judge said in his order refusing a new trial:

> "I am persuaded the jury gave heed to the instructions of the Court, and returned a verdict which they decided was in response to the positive directions of the Court in so far as any consideration of the law is concerned affecting punitive damages" (Trans., p. 16).

The Supreme Court, concurring in this view, adds:

> "While the amount of the verdict is unquestionably large, we are not prepared to hold that the award is so excessive as clearly to indicate a punitive purpose, or primarily to entail a penal consequence. * * * There is no market value for injured feelings. The value of money in comparison with the value of a normally self-satisfied state of mind of which a man may be deprived by a wrongful invasion of his rights, a trampling upon the sensitive tentacles of his personal dignity, a public aspersion upon his manhood, or by abusive treatment of any character, is a matter as to which reasonable men may—and do—differ widely. The verdict was approved by the Circuit Judge as an award of compensatory damages. His conclusion cannot be held erroneous as a matter of law" (Trans., p. 27).

On page 6 of his brief, petitioner quotes certain language from the order of the trial court refusing a new trial, appearing on page 18 of the transcript, to the effect that there would be less litigation in the Court if private rights were respected, and that the public would find solution for a number of its ills if it better understood private rights, and insisted that no one invade them with impunity or in contravention of law. Petitioner draws conclusion that "this language shows clearly

the trial judge was imbued with the idea that a verdict rendered as punishment for a wilful act could be found against the Government."

Passing, without further comment, the logical lack of sequence in this argument, it seems only necessary to refer to the quoted excerpts from the judge's charge to show that he had no such idea.

We submit that the language of the trial judge made the subject of this comment was merely preliminary to the thought expressed in the succeeding paragraph of his order that "enforced humiliation strikes at the supreme element of manliness." What the judge meant was this: It is a serious thing to humiliate a man and imperil his manliness by forcing him to submit to an invasion of his personal rights. To right such a wrong by an award of damages not only does equity between man and man, but is a salutary example of justice to which the attention of those who charge the law with failure is directed.

To summarize, we submit that there is no evidence from which this Court can conclude that the courts below were in error in holding that "the verdict indicates a punitive purpose or entails a penal consequence;" that the real nature of petitioner's complaint is that the verdict is excessive, which will not be considered by this Court; that there is no attempt to penalize the Government by disguising the nature of the action or of the recovery, nor to evade the measure of Federal liability announced by the Court of South Carolina in Jackson-Tweed Lumber Company *vs.* Southern Ry., *supra,* and later by the Court in the case of Ault; that the jury below was correctly charged as to the measure of damages and nature of the petitioner's liability, and, finally, that there is

nothing in the record to justify a reversal of the concurrent finding of two courts below that the jury followed these instructions.

Issue II.

Damages for Humiliation and Mental Suffering are Actual Damages, Recoverable Against the Director General of Railroads.

Point 1.

Compensatory Damages are Recoverable Against the Director General.

In Missouri Pacific R. Co. *vs.* Ault, 256 U. S. 554, 65 L. Ed. 1087, this Court said, in commenting on Section 10 of the Federal Control Act, that carriers shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law.

> "By these provisions the United States submitted itself to the various laws, State and Federal, which prescribed how the duty of a common carrier by railroad should be performed, and what should be the remedy for failure to perform. By these laws the validity and extent of claims against the United States arising out of these laws were to be determined. * * * The Government undertook as carrier to observe all existing laws; it undertook to compensate any person injured through a departure by its agents or servants from their duty under such law. * * * Wherever the law permitted compensatory damages, they may be collected against the carrier while under Federal control."

Point 2.

Compensation for Humiliation and Mental Suffering is a Proper Element of Actual Damages.

Petitioner practically concedes the correctness of this proposition when he states in his brief accompanying the petition herein:

> "It cannot be denied that generally speaking awards for humiliation have been considered compensatory rather than punitive" (pp. 12-13).

That a jury, in awarding compensatory damages, may consider injury to feelings, mental distress, humiliation and the like, resulting from a carrier's breach of the contract of carriage, is too well settled to justify the citation of general authorities. Such is the law of South Carolina, as settled by Lipman *vs.* A. C. L. R. R. Co., 108 S. C. 151, 93 S. E. 714; Cave *vs.* Ry. Co., 94 S. C. 282, 77 S. E. 1017; Adams *vs.* Ry. Co., 103 S. C. 327, 87 S. E. 1007.

In Lake Shore R. Co. *vs.* Prentice, 147 U. S. 101; 37 L. Ed. 97, the plaintiff was falsely arrested and abused by the conductor. The question raised in this Court was whether punitive damages were recoverable against the company. In passing upon the correctness of the charge of the trial judge, the Court said:

> "In the case at bar, the defendant's counsel having admitted in open court 'that the arrest of the plaintiff was wrongful, and that he was entitled to recover actual damages therefor,' the jury were rightly instructed that he was entitled to a verdict which would fully compensate him for the injuries sustained, and

that in compensating him the jury were authorized to go beyond his outlay in and about this suit, and to consider the humiliation and outrage to which he had been subjected by arresting him publicly without warrant and without cause, and by the conduct of the conductor, such as his remark to the plaintiff's wife."

Justice Marion, in writing the opinion of the State Supreme Court, summed up the matter as follows:

"There can be no doubt that under the settled law of this jurisdiction, prior to the passage of the Federal Control Act, such breach of the carrier's duty to a passenger as proximately caused the infliction of injury to feelings, mental suffering or humiliation even in the absence of physical injury, afforded an adequate legal foundation for the award of actual or compensatory damages. Lipman *v.* A. C. L. R. Co., 108 S. C. 151; Cave *v.* Ry. Co., 94 S. C. 282; Adams *v.* Ry., 103 S. C. 327. That view, as pointed out by Mr. Justice Hydrick in Lipman *v.* R. Co., *supra,* is in accord with the overwhelming weight of reason and authority. In the case of Gillespie *v.* B. H. R. Co., 178 N. Y. 347, 102 A. S. R. 503, the New York Court considers the question, and very fully reviews the authorities, as to whether damages for humiliation suffered because of such breach of the carrier's duty are properly recoverable as compensatory damages, and arrives at a conclusion in accord with the following statement of the law quoted from Thompson on Negligence, Sec. 3288:"

"Damages given on the footing of humiliation, mortification, mental suffering, etc., are compensatory, and not exemplary damages. They are given because of the suffering to which the passenger has been wrongfully subjected by the carrier. The

quantum of this suffering may not and generally does not depend at all upon the mental condition of the carrier's servant, whether he acted honestly or dishonestly, with or without malice."

"See Joyce on Damages, Sec. 354; 4 R. C. L. 1174, 1175. In the case at bar there was evidence tending to establish a breach of the contract of carriers by tortuous conduct subjecting a passenger to the indignity of assault and battery, insult and contumely. For the injury to his feelings, humiliation and mental suffering thus inflicted upon the plaintiff by the servants of a carrier under the control of the Director General of Railroads, we are clearly of the opinion that compensatory damages were recoverable."

In Director General *vs.* Kastenbaum, 68 L. Ed. 84 (Adv. Op. 1924, No. 3), this Court has recently held the Director General liable to a plaintiff for damages flowing from a false arrest. The case was No. 39 of the October term, 1923, and the transcript of record, page 83, shows that the jury was charged, in case the plaintiff was entitled to recover, that they might consider the money damage testified to, and also the suffering he endured by reason of being locked up overnight and by reason of humiliation at being arrested and charged with a serious offense. In this Court no special exception was taken to this language, but it was charged generally that the Government was not liable under the Federal Control Act. The position was overruled by the Court, on authority of Missouri Pac. R. Co. *vs.* Ault, *supra,* the Court saying:

"The government under paragraph 10, in a case of false imprisonment, stands exactly as if it were a railway corporation operating as a common carrier.

> Such a corporation would clearly be responsible for an arrest of the kind here shown, if without probable cause and made by one of its detectives employed to protect the property intrusted to its care as a common carrier. It is within the scope of the agency of such an employee to discover the perpetrators of crime against the property in order to recover it, and to procure the arrest of supposed offenders and their prosecution and conviction in order to deter others from further depredations. If, in the field of such employment, the agent acts without probable cause and an illegal arrest without judicial warrant is made, the corporation is liable as for any other act of its agents within the scope of their employment in carrying on the business of a common carrier. Philadelphia, W. & B. R. Co. *v.* Quigley, 21 How. 202, 210, 16 L. Ed. 73, 75; Genga *v.* New York, N. H. & H. R. Co., November 29, 1922, 243 Mass., 101, 137 N. E. 637."

Since humiliation is always present in false arrest cases and damages for the mental suffering caused by it forms nearly always a very material element of the recovery, we feel that the Kastenbaum case is conclusive of the matter.

By Way of Reply.

There are several matters suggested by petitioner's brief to which our attention has been directed.

On page 5, petitioner complains because the question of the Government's alleged wilful conduct was submitted to the jury. No similar objection was made at the trial. Moreover, if the Government be liable when its agent inadvertently fails to perform his duty, it must likewise be liable when the failure is the result of conscious neglect. The duty unper-

formed is the cause of liability, and the measure of damages is the same whether the non-performance of duty was intentional or unintentional. From the standpoint of the injured plaintiff, his actual damages are the same in either event.

In the case at bar, when Currie became a passenger, it was the duty of petitioner to afford him transportation and protect him from assault and indignity. Petitioner failed to perform this duty, denied Currie transportation and assaulted, pushed him down and bruised him, and offered him indignity under circumstances calculated to inflict, and which did inflict, intense mental suffering upon him. It makes no difference what the mental attitude of petitioner's agent may have been. He may have mistakenly read Currie's ticket; he may have honestly thought it a theatre ticket and Currie a fraudulent trespasser; he may not have seen the ticket at all; he may have been drunk, or he may have fully apprehended Currie's rights and consciously invaded them—in any event, petitioner's duty was not performed and Currie was damaged in precisely the same degree.

The foregoing remarks are equally applicable to petitioner's discussion of the Kastenbaum case on pages 24 and 25 of his brief. This Court, in that case, held that Kastenbaum was entitled to damages because the Government had failed to perform its duty toward him by arresting him without probable cause, even if it might be assumed that the Government acted in good faith. Applying such an assumption to the case at bar does not destroy Currie's cause of action or impair his recovery. The Government, in good faith, if needs be, but without good cause, has failed to perform its duty toward

Currie, its passenger, in which failure indignity, abuse and assault have been heaped upon him.

In his argument, petitioner attempts to shift his ground so as to rely upon Matthews *vs.* Davis, Director General, 117 S. E. 642 (pp. 19-21 of brief), and advances the proposition that the judgment below is wrong because it imposes a liability upon the Government for the wilful and malicious acts of its agent done in the course of his employment, but without any apparent relation thereto.

This proposition cannot be considered by this Court, for the reason that it was not raised below in any way.

The exceptions to the State Supreme Court are found in the record at pages 18, 19 and 20. Nowhere is the contention made that the Government was not liable for actual damages; the argument was that humiliation was not a proper element of such damages. There was no demurrer to the complaint, no motion for non-suit or direction of verdict. Failing to so save the point, petitioner cannot now be heard to demur to the evidence or to assert that the evidence fails to show any liability. Rule 77, Circuit Court of S. C.; Smith *vs.* Whitmire (S. C.), 110 S. E. 80; Tolbert *vs.* Fouché (S. C.), 110 S. E. 115; Scott *vs.* Seymour, 105 S. C. 43.

In Smith *vs.* Whitmire, it is said:

> "Where the undisputed facts entitle a party to a verdict, the question must be made on circuit by a motion for a non-suit or a directed verdict."

The present contentions of appellant is that the record leaves no doubt that the gateman in assaulting, cursing and abusing the plaintiff acted wilfully and without any apparent purpose of discharging his duties to the Government,

and that under such circumstances the Government cannot be held responsible. This simply amounts to saying that the Government was entitled to a verdict under the undisputed testimony, and, since the point was not raised by motion for a non-suit or directed verdict, it cannot be considered.

Not waiving the position, we call attention to the great difference between Mathews *vs.* Director General, 117 S. E. 642, and the case at bar. In the Mathews case, plaintiff was not a passenger; there was no contractual relationship between plaintiff and the Government, and the wrong complained of was not the failure of the Government to perform its contract. From the report of the case, Bell, the telegraph operator, embarked upon the commission of a private tort, in no way connected with his employment. In the case at bar, Crosswell, the gateman, was charged not only with the duty of admitting persons who were entitled to pass through the gate, *but also with the duty of stopping those not so entitled.* His transaction with Currie was not without apparent relation to his employment, but was in the actual performance of his duty.

For all of these reasons, we consider the decision in the Mathews case inapplicable, and that case is in no way under review. If it were, we should call special attention to the very able dissenting opinion.

Petitioner quotes from Hines *vs.* Gravins (Va.), 118 S. E. 114, and discusses the case at some length (Brief, 10-13). No adequate conception of this decision can be had apart from the earlier decision in the same case reported in 112 S. E. 869. The case is entirely distinguishable from the case at bar. It was an attempt to impose liability upon the Government under a statute which provided that:

> "All words which from their usual construction and common acceptation are construed as insults and tend to violence and breach of peace, shall be actionable. No demurrer shall preclude a jury from passing thereon."

The court says:

> "The design of the statute is to prevent breaches of the peace, to discourage offensive and excessive freedom in the use of that unruly member, the tongue, to inflict punishment therefor, and by subjecting those who are so hasty of temper and inconsiderate of the feelings of others as to insult them to such actual and punitive damages as may be awarded by a jury" (112 S. E. 871).

The statute so construed necessarily indicates a punitive purpose and entails a penal consequence.

It further appears that no actual damages were proved, and there was no publication of the insulting words, which were spoken to plaintiff without the hearing of any other person.

The essentially punitive nature of the statute and the absence of any actual damage leave the Virginia case without weight in the present inquiry. Under these circumstances, the Court held an action based on the statute alone not a claim for "injury to person," as used in Section 10 of General Order 20. The Court might also have held that the statute in question was beyond the purview of the Federal Control Act, wherein it was provided that "carriers while under Federal control should be subject to all laws and liabilities *as common carriers* * * * arising under state * * * laws."

It must also be remembered that in the case at bar Currie

did receive a substantial physical injury. He was shoved down and caused to fall against the iron grill or railing separating the tracks from the station, sustaining bruises. In the Virginia case, Gravins sustained no injury or damage of any kind whatsoever; there was nothing for which he could be compensated, and it was so held by the Court. Consequently, any damage awarded him must have been punitive in its character.

The case of Davis *vs.* Green, 260 U. S. 349, 67 L. Ed. 299, cited by petitioner on page 23 of the brief, is totally beyond the point. There was no question here as to the liability of the Government as distinguished from liability of a railroad company under similar circumstances. This Court held that since the injury complained of was a wilful act wholly outside of the scope of the employee's duty, there was no room for the doctrine of *respondeat superior.*

Much more to the point is Seymour *vs.* Director General (D. C. App.), 290 Fed. 291. Seymour, a newsboy on a train, held to have the status of a passenger, was assaulted and beaten by Regan, a railroad detective, who accused him of flirting. The Court held that the acts done were in the scope of Regan's authority, and on the point of the liability of the Government, as distinguished from the general liability of a master, said:

> "It is suggested by counsel for the defendant that inasmuch as the purpose for which the Government permitted itself to be sued was compensation and not punishment, this action would not lie. In making this contention, however, counsel evidently overlooked the nature of this action, which is one for the recovery of that for which the Government permitted itself to be

sued, that is compensation for injuries inflicted. See Mo. Pac. R. R. Co. *v.* Ault, 256 U. S. 554, 41 Sup. Ct. 593, 65 L. Ed. 1087."

In a special concurring opinion, Chief Justice Smythe says:

"Doubting that the act complained of came within the scope of Regan's specific authority, I prefer to place my concurrence in the judgment of reversal upon the broad ground that Seymour was a passenger and as such entitled to protection from the railroad company against assault by its employees (citing cases, among them New Jersey Steam-Boat Company *v.* Brackett, 121 U. S. 637, 7 Sup. Ct. 1039, 30 L. Ed. 1029).

We invite the attention of the Court to the Brackett case, in which it is held that a carrier is bound, as far as practicable, to protect its passengers from violence committed by strangers, and undertakes absolutely to protect them against the misconduct of its own servants engaged in executing the contract.

Respectfully submitted,

L. D. JENNINGS,
A. S. HARBY,
Attorneys for Respondent J. M. Currie.

SUMTER, S. C., *April* 7, 1924.

DAVIS, AGENT APPOINTED BY THE PRESIDENT UNDER THE TRANSPORTATION ACT OF 1920, *v.* CURRIE.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

No. 60. Argued October 10, 1924.—Decided November 17, 1924.

A writ of certiorari will be dismissed if the case as relied on by the petitioner in argument is not the case as presented in the petition for the writ.

Writ of certiorari dismissed.

CERTIORARI to review a judgment of the Supreme Court of South Carolina which sustained a judgment against the Director General of Railroads for damages alleged to have resulted to the plaintiff from the refusal of a railway gateman to allow him access to a train, accompanied by abusive language, etc.

Mr. Douglas McKay, with whom *Mr. Thos. W. Davis* was on the brief, for petitioner.

Mr. L. D. Jennings, with whom *Mr. A. S. Harby* was on the brief, for respondent.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

This writ must be dismissed. The petition therefor declared—The sole question presented is, "Can damages for humiliation and wounded feelings be awarded the respondent against the petitioner, the United States Railroad Administration, under the provisions of the Federal Control Act, the proclamations of the President and the general orders of the Director General pursuant thereto?"

At the hearing counsel relied on the following: "The judgment against the Director General of Railroads for wounded feelings and humiliation arising out of a wanton, willful and malicious act of his servant is unauthorized, involving, essentially, the infliction of a penalty upon the Government." The argument was that although the trial court distinctly limited the jury to actual damages, nevertheless, it necessarily follows from the size of the verdict that punitive damages were assessed against and a penalty was imposed upon the United States.

The petition did not state the case presented at the bar.

Dismissed.